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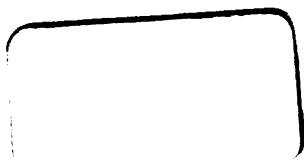
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A TREATISE
ON THE
PRINCIPLES OF PLEADING
IN
CIVIL ACTIONS

COMPRISING
A SUMMARY VIEW OF THE WHOLE PROCEEDINGS
IN A SUIT AT LAW

BY
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EDITED
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EDITOR'S PREFACE.

In view of the many works upon *Pleading* now accessible to the student and lawyer, no new work should be presented not possessing peculiar features of merit and utility, and the editor takes this place to state his reasons for presenting this edition of "Stephen on Pleading" and to state why he did not prepare a new work upon the subject, and what influenced him in the choice of "Stephen's Pleading." In order to fully answer this question, the peculiar state of the subject of pleading in the various states of the Union must be considered, and also the plan and merit of Stephen's treatise.

There exist in these states, in name, two forms of procedure, viz.: common law and code procedure; but, as a matter of fact, the codes differ one from the other, almost as much as the so-called system of code procedure differs in substantial points from the modern common-law procedure; and, notwithstanding the difference in form or substance between the procedure in the different states, in each and all it is universally admitted that the substantial rules governing the framing of allegations in the statement of causes of action as they exist and are used in framing common-law pleadings are applicable and useful for the same purpose throughout the United States, whether the procedure be code or common law, and that a knowledge of these rules is essential to an intelligent use of the code. There are many able decisions rendered in code states which are quite as useful in the common-law states to explain and illustrate the application of the principles of pleading, as they

are useful and applicable in the code states; and even so the decisions of the common-law courts are equally useful and applicable in the code states.

To make apparent how little of substantial disagreement and difference there is between the systems of pleading in use in the American states is one of the designs of the book. The choice of the work of Stephen, rather than the preparation of a new treatise, was influenced by two controlling reasons. First, it is universally admitted that these rules are as much the law as though they had received the sanction of legislative enactment, for they have entered into and become a part of the warp and woof of American law by adoption. "Stephen" is universally cited by the compilers of dictionaries, the judges of courts and authors of works upon pleading, under both code and common-law systems. His work is a legal classic.

A second reason influencing the choice was the peculiar adaptability of the arrangement of the work of Stephen to the purpose of constructing a work applicable alike, and equally valuable, in all of the states. The component parts or essential elements of causes of action are not changed by the code, and it follows that the substantial rules for framing the allegations of facts which go to make up the causes of action or defenses are but slightly affected by the code; and the arrangement of "Stephen" made the work of stating the points of agreement or divergence between the code and common law peculiarly simple and easy. As explained in his preface, Stephen treats his subject from a different standpoint than that of any other writer, in this,—that he confines himself to a consideration of the scientific treatment of the rules which should govern in framing allegations, instead of stating what allegations should be made and how they should be made as applied to particular forms of action. But to this main plan he added another

feature incidental thereto, but extremely useful to the present purpose. Chapter I of his book (Part II of this) explains the proceedings in an action from beginning to termination, and comprises a brief treatise upon practice. This enables the editor to present quite enough of explanation and modern authority to give a good idea of the modern practice. A consideration of these facts is sufficient to show that in order to present an acceptable treatise upon pleading applicable anywhere, the work of Stephen must necessarily be the frame and groundwork of it all; and that in view of the fact that practically all of the text of "Stephen" has been quoted and cited by the authorities he would necessarily cite in support of his propositions, it seemed best to give the original authority in the first instance, thereby doing justice to the author and presenting the reader a text which has upon it the "mint mark" of genuine authority.

The office of an editor may, to some, seem less dignified and original than authorship; but it is conceived that authorship, in the domain of the law, does not consist in the invention of new and original principles, but in new ideas in reference to the application, illustration and scope of old principles. Experience and observation have convinced the editor that the surest way to produce an authoritative treatise upon pleading, clear in its outline, authoritative in its statement and universal in its application, is by preparing this edition of "Stephen on Pleading." He is rendered still more firm in this conviction by the consideration that the author's work has never as yet been edited in such a manner as to support the text and illustrate its application by any adequate citation of American cases. The text of the first edition has been preserved intact. The scope of the original work is enlarged by a brief introduction explaining the origin, object and development of common-law pleading, and its relation to modern

reformed procedure. New chapters have been added upon the subject of "Joinder of Parties" and the "Election of Remedies," having for their object not simply the statement of the instances in which such joinder and election may be made, but rather to make clear the principles upon which the rules depend, and thus more thoroughly carry out the design which runs through the whole work.

The book has been divided into four parts, according to the internal arrangement of the matter. The whole has been divided into chapters and sectionized in order that the scope and plan might be clear and the arrangement easily understood by students, with whom "Stephen" has long been a favorite author.

The editor has been assisted in the preparation of the work by Arthur Percival Will, whose previous experience has well fitted him for labors of this kind.

This book cannot be dedicated: it is already the heritage of the profession. But it is hoped that this edition will render the original work still more valuable.

JAMES DE WITT ANDREWS.

CHICAGO,
November 1, 1894.

AUTHOR'S PREFACE.

The science of pleading, though vying with most other branches of our law in antiquity, and always among the highest in professional estimation, has been among the last to receive satisfactory illustration from the press. It is true that at early periods there were treatises on this subject, but their plans were confined and defective. The most important of these is the *Doctrina Placitandi*, published in the reign of Charles II.; a work which, though extremely learned and elaborate, and for a long time justly considered as the capital source of information upon pleading, amounts after all to no more than an extensive collection of adjudged points, classed without any skill of arrangement under titles in alphabetical series. In more modern times the Digest of the Laws of England, by Lord Chief Baron Comyns, presented, under the title "Pleader," a more systematic compilation upon this subject than had previously appeared, comprising the substance not only of the authorities collected in the *Doctrina Placitandi*, but also of the cases subsequently decided, and reducing the whole under different heads upon a plan peculiarly scientific and masterly. It is, however, in its nature only a digest of authorities, and better adapted, therefore, to the objects of the practitioner than of the student. Afterwards appeared the edition of Saunders' Reports, by Mr. Serjeant Williams, the notes in which comprise a mass of most valuable explanatory matter on the subject in question; but, at the same time, consist only of detached commentaries on such different points of inquiry as happen to be suggested by the

text, without aiming at the character or possessing the advantages of a regular treatise.

It is to a writer of our own day that the honor is due of having first thrown effectual light upon the science of pleading by an elaborate work, in which all its different rules are collected, arranged in convenient divisions, and illustrated by explanation and example. The work here mentioned is the well known treatise on pleading, by Mr. Chitty; which no person, competent to appreciate the difficulty of the task performed, can ever peruse without high admiration of the learning, talent and industry of the author. This has been since followed by an able publication of Mr. Archbold, on "The Law Relative to Pleading and Evidence;" comprising another regular treatise on pleading, compiled on a plan in the nature of a digest. (a)

The two works last mentioned have left very little to be added to the stock of *practical* information on the subject of which they treat. But neither in these nor in any other publication has any attempt been hitherto made to develop systematically the *principles* of this science, or, in other words, to explain its scope and tendency, to select from the mass of its various rules such as seem to be of a primary and fundamental kind, and to trace the connection of these rules and show their bearing as parts of a general scheme or system. It is to this object that the present work is directed.

The attempt was not only novel but difficult. The author had not only to collect, but in some degree also to trace and explore the principles of which he treats, and to subject the science of pleading to a new order or arrangement, such as

(a) The preceding enumeration has been intentionally confined to the principal publications on this subject. There have, however, been several treatises of minor bulk, containing general information on pleading. Among these ought to be noticed, *The Summary of Pleading*, and *An Elementary Treatise on Pleading in Civil Actions*—the latter by Mr. E. Lawes. They are both of date prior to Mr. Chitty's work.

seemed to him best adapted to the exposition of these principles in the clearest light. For that arrangement he has no authority to produce, but he persuades himself that the careful and intelligent reader will not fail to recognize the soundness of the analysis on which it is founded.

It may be useful here to observe that while in other treatises the subject of pleading has been usually discussed in the order of declaration, plea, replication, etc., it is divided in the following pages in reference to the different objects or results which its rules are conceived respectively to contemplate. In one respect, at least, this deviation from the common method is attended with evident advantage. It is an inconvenience of that method that the same rule requires to be often repeatedly noticed, in reference to each of the consecutive divisions in the series of the pleadings, so that a doctrine once laid down with respect to the declaration is afterwards propounded in a different place, but in nearly the same form, when the replication comes to be considered. The plan adopted in the present publication avoids this inconvenience and presents the rules to the reader in an entire and single view.

The nature of the work has led incidentally to the insertion, in the first chapter, of *a summary and connected account of the whole proceedings in a suit*. It is believed that the treatises to which students have hitherto had recourse for such elementary information have not been found to answer the purpose in a satisfactory manner; and some hope is consequently entertained that this part of the work may prove particularly acceptable to that class of readers.

AUTHOR'S INTRODUCTION.

In the course of administering justice between litigating parties, there are two successive objects,—to ascertain the subject for decision and to decide. It is evident that, towards the attainment of the first of these results, there is, in a *general* point of view, only one satisfactory mode of proceeding; and that this consists in making each of the parties state his own case, and collecting, from the opposition of their statements, the points of the legal controversy. Thus far, therefore, the course of every system of judicature is the same. It is common to them all to require, on behalf of each contending party, before the decision of the cause, a statement of his case. But, from this point, the coincidence between them naturally ceases. In the style of the contending statements (called in forensic language *the pleadings*), the principles on which they are framed, the manner in which they govern or affect the subsequent course of the cause, and the degree of attention paid to their construction, the practices of different tribunals essentially differ. The present disquisition relates only to that peculiar *system of statement*¹ established in the *common law of England*.

This system, known by the name of *Pleading*, (*a*) of remote antiquity in its origin, has been gradually moulded into its present form by the wisdom of successive ages. Its great and extensive importance in legal practice has long recommended it to the early and assiduous attention of every professional student. Nor is this its only claim to notice; for, when properly understood and appreciated, it appears to be an instrument so well adapted to the ends of distributive justice, so simple and striking in its fundamental principles, so ingenious and elaborate in its details, as fairly to be entitled to the character of a fine juridical invention.

(a) See Appendix, note (1).

¹ Part III.

THE PLAN.

It is proposed, in this work, to *collect and arrange the principal rules of pleading, and to explain their scope and tendency as parts of an entire system.* But, for the sake of greater clearness and comprehensiveness of view, it will be necessary, first, to give some idea of the *general form and manner of pleading, and of its connection with other parts of the suit.* The following chapter shall therefore be devoted to a summary and connected account of *the whole proceedings in an action.*¹

¹Part II.

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PART I.

EDITOR'S INTRODUCTION, JOINDER OF PARTIES,
AND ELECTION OF REMEDIES.

PRINCIPLES OF PLEADING.

INTRODUCTION.

THE DEVELOPMENT OF PROCEDURE.

§ 1. *Utility of scientific pleading.*—That the science of special pleadings has been neglected of late no one can deny. This result is due in a measure to an idea which prevails in many localities that the system of procedure, commonly called code procedure, has so simplified the mode of conducting a legal controversy through the courts, that the subject of pleading may readily be postponed until a case presents itself to the youthful tyro. No greater error ever deluded the unwary or indolent lawyer, to his client's ruin, and millions of money have been lost in a single case,¹ simply and solely on account of the disregard of the simple rules of pleading, which it is the purpose of this book to make clear.²

The administration of law between litigants can no more be understood or applied in daily practice without a clear understanding of the rules of pleading, than one can become a finished musician without mastering the scale, and acquiring, by patient study and practice, all the technique of the art.

When we witness a great legal battle in progress between two skilful lawyers, the movements are so easy that the whole seems too natural to have been the result of careful preparation; but, if they are pilots safe to be trusted, every fact adduced, every argument presented, is controlled by and relates to the issue they have formed before the trial began. The general prepares his plan of battle in his quarters; the

¹ In *Reynolds v. Stockton*, 140 U. S. 264, the judgment held void collaterally, because broader than the issue. See, also, *Waterman v. Lawrence*, 19 Cal. 210; *Munday v. Vail*, 84 N. J. L. 418; s. c., *Hughes' Tech. Law*, 125; 1 *Cooley's Black., Int.* (8d ed.), xxvii.

² *Warren's Law Studies*, 198.

lawyer who wins prepares his line of battle carefully in his office; and the parties, judge, jury and lawyers are all controlled by this, and a judgment or decree outside of the case presented by the issue is erroneous or void.

Nor is pleading important only to the trial lawyers. Trial lawyers make records, but the counselor must pass upon them as they appear in titles. It is claimed, and is doubtless true, that practically all the real property passes through the courts once in every thirty years; that is, a judicial decision is involved in every title, in the shape of a judicial sale or a decree establishing a trust, or a decree in a partition proceeding, etc., in the course of thirty or forty years; and there are many instances where, after the lapse of many years (in a recent case involving a large ranch, forty years),¹ innocent purchasers have been dispossessed, and left without remedy, simply and solely because they purchased at a judicial proceeding when the lawyers and judge omitted to make and observe the proper allegation in the pleadings, and the lawyers who passed upon the title failed to detect the error. These observations apply with equal force to code and common law, as the examples cited will show.

No more need be said to impress upon the thoughtful mind the importance of a careful study of the rules, of pleading; but the utility of pleading, as a means of saving time and money for the client, the time of the court, and the expense of an actual trial, wherein lies the chief expense of a lawsuit, will be apparent upon slight consideration. In many cases the dispute is as to the law. In all such cases, by proper pleading, the question may be left to the court for decision, and either party may appeal. In other cases, the issue may be narrowed so as to save much time upon the trial. This much upon the importance of correct pleading.

§ 2. The place of pleading in jurisprudence.—Pleading is but one member of the body of the law. Substantive law, so called, and the law of Procedure are not separate and distinct systems and should not be so regarded. They are but parts of one system. Neither can have any proper force or vigor without the other. In vain is it to declare rights if there is

¹ See Vanfleet's Collateral Attack, §§ 750-51.

no means of enforcing them. Useless and cumbersome would that form of procedure be which was not framed for and fitted to the rights it was designed to enforce and the wrongs it was intended to redress. The substantive law is made to declare rights and define wrongs, and the law of procedure is so designed as to furnish protection to every right and punish every wrong.

Whatever controversies may have existed in the past in reference to the influence of the Roman law upon the character and institutions of the Saxons with whom they mingled, there is no longer any doubt that the Roman occupation of Britain for a period of over four centuries left indelible traces upon the characters and institutions of these people. Britain was christianized under the Roman influence, and was subject to the Roman law; in short, there was a commingling of blood, of religion, of law. But irrespective of this, the result of the study of the Roman law in late centuries exerted a still more powerful influence upon the legal institutions of England.

The arrangement and principles of the Roman law were observed by Bracton, the first treatise in the English law which can be said to be pervaded by a system. Hale's Analysis of the English Law is based upon the principles observed by Gaius. This analysis of Hale was recognized by Blackstone as the most beautiful outline of the English law ever before devised. He might well have gone further and said it is the most perfect outline of the laws of any nation ever yet devised; and Blackstone felt compelled to and did adopt it as the basis of the outline upon which he constructed his Commentaries of the Law of England.

English law has, since that time, been treated as it relates to personal relations, to property rights, and the law of actions or procedure. The law of personal relations furnishes us with those rules which govern our actions as magistrate and people, and in our personal relations as individuals. The law of things or property declares the rules which shall govern the ownership, enjoyment and disposal of things. The law of procedure points out how these rights shall be protected, and any wrongs against them judicially redressed.

The subjects of Pleadings, Practice and Evidence comprise

what is commonly called the law of procedure. The line of demarkation between substantive law and procedure is not clearly drawn by text-writers. Each has its appropriate sphere, but it is a common fault with modern text-writers to pay but little regard to the outlines or analysis which furnish the boundary lines between the various subjects of the law. This state of affairs probably results from the fact that we have no accurate outline of our law. For instance, James Fitzjames Stephen¹ regards the question, what may be proved under a particular issue, as belonging to the domain of substantive law and pleadings. So he regards presumptions as belonging to substantive law. Thus he narrows very materially the scope of the law of evidence as treated by Taylor or Greenleaf. Practice is that branch of procedure which points out in what manner the various steps are to be taken. Pleading relates to the orderly presentation upon the record of the contention of the respective parties in relation to the subject-matter of the controversy.

§ 3. **Modern reforms in procedure.**—The last century and a half has been prolific in law reforms in all the great departments of jurisprudence. It is asserted by one of the most profound lawyers of the revolutionary period that the science of government, properly so called, never existed on the other side of the Atlantic until after the American Revolution,² the basis of the assertion being that rulers were occupied with the art of obtaining and perpetuating power, giving themselves little or no thought in regard to the true science of government as it is now understood. For instance, Bacon was content to say, "I shall hardly consent that the king shall be called only our rightful sovereign or our lawful sovereign, but our natural liege sovereign."³ . . . Concerning government, it is a part of knowledge, secret and retired in both these respects in which things are deemed secret, for some things are secret because they are hard to know, and some because they are not fit to utter."⁴ And Blackstone tells us that Elizabeth herself was wont to direct her Parliaments to

¹ Stephen's Dig. Ev.

² Jas. Wilson, 1 Works, 23.

³ Argument in Post Nati Scotland,
Bacon's Works, vol. 2, 169.

⁴ Advancement of Learning, Bacon's Works, vol. 2, 233.

abstain from discussion of matters of state, admonishing them that they ought not to deal, to judge, or to meddle with her majesty's prerogative royal.¹ And while Blackstone was not an open advocate of the theory of the divine right of kings, by his definition of law, and his reasons for it, he argued himself into that position in spite of himself.²

We are not interested in this inquiry further than it throws light upon the development of the law of procedure and the institution of tribunals for administering justice with which we are now familiar under the denomination of the courts of law and chancery.

The most noteworthy instance of law reform which has been instituted on this side of the Atlantic since the formation of the federal constitution is in the field of procedure, and the example of reformed procedure most frequently cited is the New York code, the principal features of which have been adopted in many of the states. There has not been an entire unanimity of opinion as to the merits of this code among those who advocate codification. For instance, Mr. R. T. Barton, one of the committee on codification of the Virginia State Bar Association, in his remarks upon the relative merits of the various codes in use in different states, remarked that "The modern demand for reform is set forth in the English code, the Connecticut code and in the Massachusetts code." "I have found the New York code full of dangerous pitfalls. That state did not adopt the new code, but grafted on some portions of the code prepared by Mr. Field to the old method. The new wine has burst the old bottle. The code of David Dudley Field was never adopted in New York as a whole, but extracts from it have been sewed onto the old code, and the New York code is an example to be avoided."³ This example, however, it is claimed, has been followed in some twenty-eight states, and is often held up as an example of perfect procedure; but this committee, after a careful investigation within the last year, reports that this is an example to be avoided. It is safe, however, to assert that merely the word "code," or "codification," does not, of itself,

¹ 1 Black. Com. 238.

² Report Fifth Annual Bar Associa-

³ Hammond's Black., p. 111; 1 Will-
son's Works, pp. 65-85. tion, 1898, p. 28.

render anything to which it is applied simple and clear; there is no magic in the word "code." There is an essential difference between codes.

There is also a decided disagreement of opinion between the advocates of a code and those who prefer to practice under the reform system of common-law pleading in vogue in those states which are yet, to distinguish them from the code states, called common-law states. One is not to suppose that, because a state is still denominatd a "common-law state," that the procedure of the courts in that state is marked by the same rigor and technicalities which existed in the ancient common-law procedure.

The latter part of the year 1893 witnessed two notable discussions of the comparative merits of the common-law system of pleading and procedure, and the code system; namely, in Virginia and Michigan. These discussions disclosed a decided lack of agreement. As usual, however, the discussion took the form of a comparison on the part of those advocating the code system of the present advanced state of reformed procedure with the ancient common-law pleading and practice, with all the cumbersome forms, useless fictions, and technical phrases used in allegations in causes of action and defense, before the reform of the common-law proceeding began; while a comparison is seldom made between the practice under the common-law system, as reformed and simplified by modern provisions and the various statutes in reference to amendments and jeofails, with the practice and pleadings in the same sort of action in a code state. On the other hand, many of the defenders of the common-law system took the position that there is neither science nor certainty in the code procedure, and that there is no way of knowing what is the real state of an issue between litigants in a trial at law, as usually practiced in a code state.

The essential question for the student of the science of pleading in America to determine is, what is the essential distinction between the common-law system and the code system of pleading. The mere calling of legislative enactments codification does not invest the result with simplicity, and divest it of all formality and technicality. All disregard of form would not be desirable. A uniform and orderly mode

of transacting business in the courts is essential. There are those who seem to think that any person of ordinary intelligence can, without much trouble or previous study, conduct a lawsuit safely through the courts, if the procedure be called code procedure.¹ "Men imagine," says Lord Bacon, "that their reason governs words, while in fact words react on the understanding, and this has rendered philosophy and the sciences sophistical and inactive. Hence the great and solemn disputes of great and learned men often terminate about words and names, in regard to which it would be better to proceed more advisedly in the first instance, and to bring such dispute to a regular issue by definition."²

One who is described as a most eminent advocate of the code, in fact, a judge in a code state, in a letter written to another like-minded with himself, says, in reference to the provision commonly found in the codes, "that the forms of actions and suits heretofore existing are abolished, and hereafter there shall be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be called a civil action:" "*Here in five lines was a complete wiping out of the accumulated wisdom of ages.*" This impression seems to obtain with many lawyers, that the adoption of a code revolutionizes at once the law of the state. On the other hand, the light in which the reform procedure was viewed by its opponents in the earlier day is very well illustrated by the remarks of Justice Grier in a case pending in the supreme court of the United States, which came up from Iowa, wherein he compares what he terms the simplicity and certainty of the common-law procedure with the delay, uncertainty, perplexity and vexation occasioned by this new system of pleading, as practiced in that case. The common law, he says, wisely commits the decision of questions of law to the court, and the decision of questions of fact to a jury, and it requires that controversies should be submitted in such a way as to present one or more integral propositions of law and fact. This is done in the shape of allegations, called pleadings. These should distinctly and succinctly state the nature of the wrongs

¹See Warren's Law Studies, 198.

²Novum Organum.

complained of, the remedies sought, and the defenses set up. The end proposed is to bring the matter to one or more points, simple and unambiguous. He notices the excessive technicality introduced by astute logicians, which we will notice further on. The cumbersome forms and fictions, which, in an earlier day, had brought the system of special pleading into deserved disrepute.¹ But in modern times it had been modified, or trimmed of its excrescences, and the pleadings in every form of action have been so completely reduced to simple, clear and unambiguous forms, that the merits of the case are never submerged under folios of special demurrers (as was the case in the suit he was deciding), alleging errors in pleadings. "This system, matured by the wisdom of ages, founded on the principles of truth and sound reason, has been ruthlessly abolished in many of the states who have substituted in its place the suggestions of sciolists, who invent new codes and systems of pleading. But this attempt to abolish all species and establish a single genus is beyond the power of legislative omnipotence; they cannot compel the human mind not to distinguish between things that differ. The distinction between the forms of action for different wrongs, requiring different remedies, lies in the nature of things. It is absolutely inseparable from the correct administration of justice in the common-law courts. The result of these experiments, so far as they have come to our knowledge, has been to destroy the certainty and simplicity of pleading, and introduce on the record endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice."²

These opinions of different jurists as to the relative merits of the two systems, as they stood and were practiced in the earlier time, are here given, not to introduce a wrangle in reference to the relative merits of either system, but to show how the opinions of men may differ upon matters, and how, in defense of their views, they will use extreme language.

There is no advocate of the code to-day who would pretend that codification swept away the accumulated wisdom of ages in reference to the subject of special pleading as it existed

¹ 3 Black. Com. *408-9.

² See *McFaul v. Ramsey*, 20 How. 523.

when the first code was adopted in the United States. And while the opinion of Judge Grier may not have been free from prejudice, yet so far as it states facts in reference to the workings of the code system at that time,¹ it may safely be relied upon as stating the truth; and his opinion as to the system finds corroboration in the fact of the vast amount of litigation over the code, as reported in the practice reports in the state of New York.

Great progress has been made in the code states in the science of pleading since that time, and lawyers and judges have learned that even code pleading is an art, and have acquired it; but they have done so only by applying themselves to the study of the common-law system, and avowedly applying the rules taught by common-law special pleading to the provisions of the code. An unprejudiced observer, standing aloof from participation in the discussion, may well inquire, has all the growth in the direction of reform procedure been in the code states, and has the common-law pleading and practice not developed or changed in the direction of simplicity?

§ 4. **Common-law pleading, its merits and defects.**—There is a safe middle ground, which, upon careful investigation and sober reflection, will be found to be the true position. The two systems have grown side by side, constantly approaching nearer each other. The forms, fictions and extreme subtleties of the common law have given way to the advanced thought of modern times, and this is due largely to the influence of the law reformers. As the common-law and equity systems could not preserve their integrity side by side, neither can two systems of procedure exist side by side in these states without each modifying the other.

The reformers in pleading now recognize the value of the distinctions, the reason, and logic, of the common-law system of pleading. The advocates of the code only profess to have abolished forms.

The student of American law cannot understand the system of procedure in vogue in any of the states without having some idea of the system of common-law and equity procedure practice in the United States and England prior to the adoption of the first code, especially where it is claimed that all

¹ 1857.

distinctions between common-law and equity pleading are abolished.

The common law of England grew up around forms of action, and was in a measure molded by them. The origin and invention of these forms of action have been ascribed to various sources. There are those who do not hesitate to pronounce the procedure by writ and by bill, and the arrangement of actions into classes, to be of Roman origin,¹ and this opinion seems to find favor with our author;² but in truth the inquiry is not of vital importance. Because there are found features of similarity between different systems does not prove a common origin or that one is modeled from the other. Each step in the proceedings in the public forum of a country will find its equivalent step in the tribunal of the neighboring nation of the same age; and in the nature of things a first step towards setting the judicial power in motion in every country and so on to the conclusion of the controversy, step after step, will be taken, and each step will bear some resemblance to the corresponding steps in other jurisdictions. While the resemblance of the English to the Roman methods is not of great practical importance, it may in some measure account for the peculiar faculty of analysis which is displayed in the arrangement and classification of causes of action; for these common lawyers did employ the principles of legal analysis which contrast subjects because of distinctions between them and group subjects because of similarities.

The common law never recognized so many forms of action as it did causes of action, but grouped under one form of action as many causes of action of the same nature as admitted logically of the same mode of trial and the same judgment. For instance, the action of trespass on the case embraced all the various causes of action upon simple contracts and a multitude of different causes of action for various wrongs against person and property unaccompanied by force, including the action of trover. The whole system was essentially logical. "The science of special pleading is an excellent logic. It is admirably calculated for the purpose of analyzing a cause; to extract, like the roots of an equation, the true points in dispute,

¹ Reeves' Hist. Com. Law, 814-852, ² Appendix, note 2.
notes.

and leaving them with all imaginable distinctness to the court or jury. It is reducible to the strictest rules of pure dialectics, and tends to fix the attention, give a habit of reasoning closely, quicken the apprehension and invigorate the understanding.”¹

The excessive strictness which once deformed it was not a natural outgrowth of the system. We are told by Blackstone² that in an early day corrupt judges fell into an evil habit of making false entries on the roll to cover their own misbehavior, and took upon themselves, by amendments and erasures, to falsify their own record. The king, therefore, declares that, “although we have granted to our judges to make record of pleas pleaded before them, yet we will not that their own record shall be a warranty for their own wrong.” And King Edward the First, after his return from France, instituted vigorous prosecutions against his judges for their corruption and malpractices, inflicting heavy fines and severe punishments. The severity of these proceedings alarmed the succeeding judges, so that, through a fear of being said to do wrong, they hesitated to do what was right, and they supposed it so hazardous to alter a record that they refused to correct even palpable errors, and some refused even to judicially amend and make their errors agreeable to the truth. “To this real sullenness,” says Blackstone, “but affected timidity of the judges, such a narrowness of thinking was added that every slip, even of a syllable or a letter, was now held to be fatal to the pleader, and overturned his client’s cause. . . . Yet these were among the absurd reasons alleged for never suffering amendments at all. These precedents then set were afterwards most religiously followed, to the great obstruction of justice and ruin of the suiters, who have formerly suffered as much by this scrupulous obstinacy and literal strictness of the courts as they could have done even by their iniquity.”

These matters were, in a measure, corrected and obviated by the various rules and statutes allowing amendments.³

Such was the technicality of the common-law procedure and such the cause thereof. The remedy was found in the

¹ Speeches of Isoeus, Warren’s Law Studies, 208; Robinson v. Bayley, 1 Burr. 819; McFaul v. Ramsey, 20 How. 523.

² 8 Black. Com. *408.

³ See Appendix for the statutes of Amendments and Jeofails.

various enactments, principally the statutes of amendments and jeofails.¹

§ 5. **The rise of the court of chancery.**—Let us obtain a notion of the equitable system and the origin of the court of chancery. The invention of that system or branch of the law which we term “equity” cannot be ascribed to our English ancestors. Every system of government which has made any pretensions to a system, or which can be called in any measure civilized, has recognized that there may arise a state of facts between parties which, if decided according to the strict letter of general enactments and positive rules, which must of necessity be expressed in general terms, will, on account of the poverty of language, not embrace and provide for every combination of circumstances in such a way as to afford a just and proper remedy for every wrong, and that the ordinary courts to which the administration of the law is delegated will not always afford adequate relief.

The most popular definition of equity still in use is that of Aristotle, at whose feet Alexander the Great received instruction. He says: “Equity is the correction of that wherein the law, by reason of its generality, is deficient.” The same idea is put by Grotius: “The correction of the law wherein it is defective by reason of its universality.”²

In a monarchy, where the sovereignty was, in truth and in fact, in the ruler, the rigidity of the law was easily corrected by an appeal to him personally. This was doubtless the reason for teaching the king and the king’s sons, even the great Alexander, the principles of natural equity, or, as they were denominated in those times, the great natural laws, in order that he might administer these principles in cases of hardship appealed to him. Even the higher developed law, which, it is said, is indebted for many of its best principles to the Greeks, left it within the power of the chief magistrate to do equity and justice, it being a maxim that “whatsoever pleases the prince has the force of law.” So long as the prince or ruler is recognized as the fountain of justice and honor, so long the principles of equity may be administered without fear of the charge that, in applying these principles of natural law, he is dispens-

¹ 3 Black. Com. 406.

² 1 Willard’s Equity, *37; 1 Black. Com. 61.

ing with the law of the land. Thus, Lord Bacon says concerning the office and prerogatives of the crown: "But I demand, do these offices or operations of law obviate or frustrate the original submission which was natural. The allegiance of subjects to hereditary monarchs is corroborated and confirmed by law, but is the work of the law of nature, and therefore is the observation true that law-givers were, long after the first kings who governed for a time by natural equity, without law."¹

It is in recognition of these principles that the equitable doctrines were first administered in England by the king in person under his royal prerogative, as the source and fountain of justice and honor, and the granting of such relief in cases of hardship as commended themselves to the mind of the prince offered no obstacles until limitations were placed upon the prerogative of the crown, either by statute or by charters. The unlimited prerogative of the crown in dispensing with law for the purpose of dispensing justice never found favor in the Saxon community, and it became a requirement to have these appeals either to the king in council or to Parliament.²

The office of chancellor in the king's courts is not to be confused with the court of chancery as we now understand it. The chancellor was an officer of the *curia regis* long before the existence of the separate court of chancery,³ and it was his duty to frame writs in new cases, as they arose, for the common-law courts under what was termed the action on the case.⁴

The limitations upon the power of the crown, contained in the various charters, which destroyed his power to dispense with the law, is the main cause for the establishment of the equitable jurisdiction in a court with a fixed place and not following the person of the king, and this seems to have been established under the name *coram legi in cancellaria*.⁵

The extraordinary court of equity soon became an important

¹ Argument in Post Nati Scotland,

⁴ 3 Black. 50.

² Bacon's Works, 169.

⁵ 1 Spence, Eq. Jur. 344; 1 Reeves'

³ 1 Reeves' Hist. Com. Law, 238.

Hist. Com. Law, 238.

³ 1 Reeves' Hist. Com. Law, 279, 280, notes; 3 Black. Com. 46.

factor, exercising, as it did, powers of the highest nature, of such dignity that had heretofore been ascribable only to the prerogative of sovereignty. It seems that the establishment of different courts for the administration of law and equity, as they arose in England, was not known to any other country prior to this time, the different systems being administered under the Roman law by the same tribunal, the *jus prætoriam*, or discretion of the prætor, which stands for equity, being distinguished from the *legis* or ordinary rules of law, but both being centered in the same magistrate; and in England the *aula regia* administered equal justice according to the rules of both or either, as the case might require. And when this court was abandoned, the idea of a court of equity as distinguished from a court of law was not a part of the plan of partition.¹

In later times, when the jurisdiction of the court of chancery to interfere with judgments of the courts of law was questioned by Sir Edward Coke, the king referred the matter to men learned in the law, who reported in favor of the jurisdiction of equity upon established principles of jurisprudence. But the king himself was not satisfied to rest the jurisdiction merely upon ordinary legal principles, but referred the matter to the plenitude of his royal prerogative.²

For a long time it was considered impossible to reduce the practice in equity to stated rules,³ although Bacon reduced the practice to a more regular system; but at the time of the American Revolution, the principles and rules of the court of chancery were a connected system, governed by established principles, and bound by precedents.⁴

The fact that the court of chancery was established as a separate tribunal is important to the American student, in view of the modern tendency to invest the same court and the same judge with both the common-law and equitable jurisdiction, the separation being more by chance, for purposes of utility, than upon any reason or inconsistency of the same tribunal exercising the different powers and affording the different remedies.

In reference to equity jurisprudence we may adduce the

¹ 8 Black. Com. 49.

² 1 Black. Com. 92.

³ 2 Black. Com. 54.

⁴ 8 Black. Com. 432.

following principles: 1. The reason and necessity for equitable relief was the inability of courts applying the ordinary positive rules of law to grant, in all cases, complete and adequate relief. 2. The original source of the jurisdiction rested upon the plenary power, which was admitted to exist in a personal sovereign. The source of the jurisdiction in a tribunal or court, other than the monarch, rests in his power to delegate his authority to ministers. Thus, in England the courts were the king's courts. He was the fountain of justice and honor, and it was a part of his prerogative to administer law and justice. The reason and necessity for the recognition of equitable powers in the courts by the sovereign body in England (Parliament) arose by reason of limitations upon the power of the personal sovereign to dispense with the strict rules of the law. The grounds for the jurisdiction are always the same; namely, the inability to provide by positive law, whether evidenced by a statute, a custom, or a judicial decision which must be expressed in general language, rules which would be equitable for every and all combinations of circumstances which might arise; for, as there be those "that steal the livery of heaven to serve the devil in," so the craft and ingenuity of the human mind, in seeking to injure or defraud, is often careful to assume the garb and form of law.

§ 6. **The court of chancery in America.**—Such is a brief and imperfect sketch of the rise of equitable jurisdiction as a separate tribunal, and the student must remember, as his mind notices the transition from English jurisprudence to the jurisprudence of America, another principle. The king in England was the chief executive officer and the judiciary was but a branch of the executive and largely dependent upon him until after the Revolution in America, although by the Revolution of 1688 in England the king was practically stripped of all the ancient attributes of sovereignty. Parliament was the sovereign body and was the ultimate tribunal for all the courts, legal as well as equitable. But there was no such thing known as a co-ordinate power or jurisdiction under the name of judicial power which was equal in importance with the legislative and the executive, such as exists in the United States. When the instruments of government were created by the people of the United States in whose hands the sover-

eighty devolved upon obtaining their independence and establishing the constitution which created this Union of States a Nation, the principle that power is never to be exercised as of personal right rendered it unnatural that any department of government should be dependent upon or subordinate to another, and rendered it natural that the judicial power should be delegated to such hands as the people might, in the plentitude of their power, select. Following the example of their English ancestors, although not based upon any necessity or reason, they established different tribunals for the administration of law and equity under the denomination of the judicial department. The development of the science of law and experience have shown that there is no necessary conflict between the two systems, and that they may be administered in the same tribunal, until now the almost universal practice is to have courts instituted with both equitable and legal jurisdiction.

It is interesting to notice that the origin of our judicial system may be clearly traced back of what we term the "mother country," and that in its source and pristine vigor as administered under the Roman tribunals, the jurisdiction of equitable and legal powers rested in the same magistrate,¹ and that, for reasons accidental or arbitrary in the English law, they were delegated to separate tribunals, and that in our own time, in the spirit of true reform, we are drifting constantly nearer to the ancient model furnished by that wonderful people, who at one time ruled the whole civilized world, and who so treated those whom they conquered that they made them Roman, not so much by the influence of their own personality as on account of the undying nature of a principle;² for year by year, as the study of jurisprudence is pursued, it is found that we are indebted to the Roman law for many of our most useful principles of law and procedure.

The people of the United States may justly claim that they have invented a system of government, which, through its reflex action, bids fair to become universal. But in the domain of private law there is little to do but to develop and perfect that system of jurisprudence which was the contribution of

¹ 8 Black. Com. 49; *McConighty v. Wright*, 121 U. S. 206. ² 1 Reeves' Hist. Eng. Law, Int., xxi.

the Romans, "that magnificent people which once ruled the world by the sword, and ever since held a half dominion by the silent empire of their laws. . . . Let us collect and bind together in their appropriate places what we have, and then we can the better tell what more we need."¹

§ 7. **Distinctive features of code reforms.**—The abolition of all forms of action, the abolition of the distinction between actions at law and suits in equity, which results in the introduction of one simple mode of procedure for all the various classes and kinds of actions, the proposed abolition of fictions and technical language, and several new rules as to joinder of parties, are claimed to be the crowning achievements of codification. The allowance of amendments incidentally completes the reform. Taking these in their order, let us see how far they have been accomplished. The subject of joinder receives special treatment in the text and need not be mentioned here.²

First, what has been the result of the attempt to abolish all distinction as to the forms of actions? There seems to be a misconception in respect to this object of the code. It is sometimes supposed that the intention and object of the code was to affect in some manner the elements which constituted a cause of action at common law. But the code of procedure makes no attempt to introduce any new causes of action or to dispense with any of the facts necessary to constitute what has heretofore been recognized as a cause of action. The change intended is merely in the form of procedure by which the remedy for a right is judicially administered.³ Thus in Illinois (a common-law state) the legislature abolished the distinction between the action of trespass and case, but the court held that while the technical distinction between the forms of action were abolished the rights and liabilities were not affected,⁴ and a count in trespass or case must have the same facts as formerly. A count in either would not be proved by evidence of the other.⁵

¹David Dudley Field's address to v. McCarty, 41 N. Y. 107; Meyer v. the American Bar Association, 1889. Field, 87 Mo. 484.

²Post, tit. Joinder of Parties.

⁴Blalock v. Randall, 76 Ill. 324.

³Cole v. Reynolds, 18 N. Y. 74; Peck v. Newton, 46 Barb. 173; Lattin

⁵Gay v. De Werff, 17 Ill. App. 417.

It is quite plain that the facts which constitute the cause of action have not been affected by the code,¹ and it would seem to follow that no change had been made in the nature of rights and the character of injuries to them which would constitute a cause of action.

A code might provide that the distinction between forms of action should not be recognized, but there must remain a substantial difference in the formal statement of different cases.

The codes of all the states require that the complaint or petition which stands in place of the narration, or count, or bill, shall contain a brief and clear statement of all the facts constituting the cause of action in ordinary language. It is quite apparent that in a code state, as well as in a common-law state, the form of complaint upon a promissory note will not be the same as the form of complaint in a case of assault and battery, and that the claim for assault and battery will not support a judgment upon evidence showing a good cause of action for the negligent injury without force, etc.; that is, under the code you are obliged to have a narration (declaration) different in its substantial part for every cause of action, alleging the identical facts that were necessary to constitute a cause of action at common law. It is true that the declaration or petition or complaint does not have to conform to the writ; i. e., it does not have to state that the defendant is summoned in a plea of trespass on the case, or trover, etc., but the body of the count must conform to a distinct theory.

An examination of the different works on code procedure will show that the forms of petition under the code are more numerous and various than can be found in any work on common-law pleading. In Maxwell on Code Pleading there are four hundred and sixty-six (466) forms of petitions, one hundred and twenty-six (126) forms of answers. Boone gives six hundred and four (604) different forms.

It cannot be pretended that these different forms are the same in substance.

There is much truth in the remark made by Chief Justice

¹Frost v. Dunkin, 19 Barb. 560; 27 Barb. 810; Hill v. Barrett, 14 B. Cropsey v. Sweeney, 7 Abb. Pr. 179, Mon. 83.

Grier: "The attempt to abolish a species and to establish a single genus is beyond the power of legislative omnipotence." There is no such mysterious magic in the word "code." You cannot compel lawyers not to distinguish between things that differ. So long as the causes of action differ from each other, so long must the forms of statements thereof used by the pleader differ in substance, and the form must follow the substance under either system.

The next improvement claimed for code procedure is that of abolishing the distinction between proceedings in actions at law and proceedings in suits in equity; but this claim is not sustained by the facts. It is not true that in actual practice in the code states the procedure is the same in a case which was originally a common-law action as the procedure in another case which, before the adoption of the code, would have been called an equitable action.¹

It is not pretended by those best acquainted with the code procedure that the distinction between law and equity is actually abolished. Thus, Professor Pomeroy says: "The distinction between law and equity is not abolished. These two departments of the municipal law, comprising their distinctive and peculiar primary rights and duties and furnishing their special remedies, are left untouched by legislation, and it is plain that they cannot be consolidated into one as long as the jury trial is preserved by the constitutional enactments in the various states. The change does not extend to the rights and duties themselves, which are collectively called law and equity, nor to the remedies which have been used in maintaining these rights, but is entirely confined to the judicial instrument used to afford the remedies."²

Again he says: "The abolition is not of the distinction between law and equity, or legal and equitable rights and remedies, but between the forms of action or proceedings by the abolition of common-law pleading."³

The courts have agreed that there is an inherent essential difference between law and equity, and they uniformly recog-

¹ *Peck v. Newton*, 46 Barb. 173.

² *Pomeroy's Code Rem.* 39, 40, 73.

³ *Pomeroy's Code Rem.* 86. See 72. Much to the same effect will be found in *Maxwell's Code Pl.* 72, 73.

nize a distinction essentially different in the procedure in the different kinds of actions in the code states.¹

Here is an express admission that there is an essential difference between law and equity, and that this difference must be recognized in practice; and it so happens that this difference extends to the mode of administering rules in the courts of equity, which is essentially a difference *in the procedure*. Now the basis of the jurisdiction of courts of equity was to enforce equitable rights, and to directly proceed against the man himself; hence the maxim that courts of equity act *in personam*,² and cannot *directly* affect property,³ while courts of law primarily award damages, and the remedy afforded at common law generally exhausts itself when the property of the man is exhausted. There is an essential difference between the object and manner of pleading at common law and in chancery. The prime object of common-law pleading is not only to apprise the opposite party of the cause of action, but to arrive at one or more integral issues between two sets of opposing parties; while the allegations in chancery may set forth specific facts concerning several transactions between any number of different parties, or sets of parties, and limited only by the multitudinous circumstances by which many persons may obtain different interests in one subject-matter, or how various subjects may be mingled towards accomplishing a common object. There can be but two sets of parties at law, and all upon one side must be interested in the same way and be entitled to the same thing; but in equity there may be many different classes of litigants whose interests are different. In one case the parties oppose each other in one or several integral issues; in the other they radiate around a common object. At law the right can be upon but one side, while in equity all may have a just and valid interest in the subject-matter, either of the same kind and degree, or differing in kind, quality or degree.⁴

¹ *Basey v. Gallagher*, 20 Wall. 670; 584, 44 Am. Dec. 412; *Baker v. Rock-McConighy v. Wright*, 121 U. S. 201; *abrand*, 118 Ill. 365; *Hart v. Sansom*, 110 U. S. 151.
Story's Eq. Pl., sec. 26, note.

² *Gardner v. Ogden*, 22 N. Y. 327; ⁴ See Willard's Eq. Jur. (Potter's ed.) 43; *Langdell's Sum. Eq. Pl.*, § 41.

³ *Bracken v. Preston*, 1 Pinn. (Wis.)

The mode of trying questions joined at law and in chancery has been, and in many code as well as common-law states must still continue to be, different until changed by constitutional enactments. "It cannot be doubted," says Willard, "that the blending of all actions into one single form may in some circumstances cast a doubt over the rights they are designed to protect."¹

In 1884, Judge Pitt Taylor, author of the work on Evidence, in his preface to the eighth edition remarks in regard to the English Judicature Acts of 1873 and 1875: "The fusion of law and equity, which was to overthrow such a phalanx of abuses, and to frustrate so many knavish tricks, has resulted not only in confusion, but, to use the vigorous language of our blind bard, in 'confusion worse confounded.' It is a humiliating confession but it is unquestionably true."²

The third point claimed is that greater simplicity, expedition and ease of administration is obtained under the code than in the common-law system. But this cannot be demonstrated with any degree of certainty, and we need but refer to the numerous volumes of reports in code states of decisions upon points in practice to satisfy ourselves that no code which has yet been developed has rendered free from all necessity for skill, discrimination and subtlety, the application of the principles of the law and evidence to disputed facts in the adjudication before a judicial tribunal.

§ 8. *The systems contrasted.*— There is not such great difference in principle between the reform procedure in the code states and the reform procedure in the so-called common-law states. For instance, in Illinois, which is still called a common-law state, the ancient fictions are no longer in use, and there is a liberality and simplicity in allegations equal to that in use anywhere. There is great liberality of amendment and an entire obliteration of the ancient useless technicalities and fictions. This is accomplished by the provisions of the Practice Act, which, to all intents and purposes, may be termed a code of procedure in civil cases.

The code procedure is claimed by some to differ from the common-law system of pleading in that it may be designated

¹ Willard's Eq. Jur. (Potter's ed.) 48.

² Taylor on Evidence (8th ed.), 1884, Preface.

as the "fact system." Those who attempt to make this distinction allege the vice of the old system to be its general averment (common counts), prolixities and general issues, and the delay and expense inseparable from this.¹

The code of every state provides that the substantial facts constituting the cause of action shall be set forth with reasonable certainty, conciseness and succinctness. That is all that is required in the common-law states.

Chitty, in his work on Pleadings, states that the declaration must allege all the circumstances necessary for the support of the action, and generally a full, regular and methodical statement of the injury which the plaintiff has sustained.²

"The province of the declaration," says the supreme court of Illinois, "is to exhibit upon the record the grounds of the plaintiff's cause of action, as well for the purpose of notifying the defendant of the precise character of those grounds as of regulating his own proofs. When it performs such office, in such manner as to leave no doubt on the mind of the defendant either as to the nature or origin of the plaintiff's claim, it ought not, on principle, to be adjudged bad."³

Now this is all that is required at common law. Will anything less do in a code state? Only in actions upon contracts is anything less allowed at common law, namely, in *assumpsit*, where the common counts are used. The reason given in Chitty for the use of common counts was to save the verdict where the evidence varied from the special count. Certainly no code pleader would complain of such a reform as that instituted for that reason. There are only *four* forms of common counts, namely, *indebitatus assumpsit*, *quantum meruit*, *quantum valebant*, and account stated.

Afterwards, by a statute passed in a spirit of reform procedure, a common count was allowed in cases for use and occupation.⁴ The only defect of allowing common counts was, and is, that the common counts do not inform the defendant of the special facts constituting his action; but as the action is always confined to contracts, a motion for a bill of particulars furnishes a complete remedy for this defect, and the practice is almost uniform to file special counts upon everything. No

¹ Maxwell, Code Pl. 105.

² 1 Chitty's Pl. 255.

³ Cook v. Scott, 1 Gilm. 333.

⁴ 1 Chitty's Pl. 354.

default can be taken unless a copy of the instrument or account sued on is filed and sworn to, and a bill of particulars may be required of a defendant using a general issue. The common counts and general issues are doubtless open to the objection of generality, but they have the other merit of simplicity; but in this respect the codes do not change the common law. Common counts are permitted by the codes.¹ And since the reason for the common count has by reason of the liberal allowance of amendments ceased to exist, there is no longer any necessity for the common counts. The general issue being a simple denial should be preserved, but with the disuse of the common count it would naturally not admit evidence of payment, etc.; a special plea would and should be required.

§ 9. Relation of common-law pleading to code procedure.—It is no longer pretended that the knowledge of common-law pleading is rendered useless by the code, but that the same fundamental principles underlie both systems. "It is assumed," says one, "that the student of the code is familiar with the common-law and equity systems of pleadings. If, not, he is groping in the dark, and much that is offered will escape his apprehension. This knowledge is deemed essential, not only because well-educated lawyers must know the history of our jurisprudence; must live through as it were, and measure every step of its marvelous progress, but because the foundation idea of pleadings is not changed."²

This sounds very much like saying that the substantial ideas of code pleading are derived from the common-law system, and the common-law system you must know. This is essential, but you must call it code pleading. The student is promised something new, clear, simple and easy, but useless without the other, which is called intricate, technical, complex, but which must be understood. The common-law pleader requires no assistance from the code in order to plead his cause. The most subtle things in the world are simple and easy to one who understands them. Many simple things confound those who will not take time to learn.

The common-law system of procedure, as now administered

¹ *Allen v. Patterson*, 7 N. Y. 476, 57 Am. Dec. 542, and note. ² *Bliss, Code Pl.* (2d ed.), sec. 141.

in the states adhering to it, is not open to the charge of being either uncertain or verbose, complex or highly technical, and it cannot be demonstrated that its forms are more cumbersome, or its practice more tedious, than in the same actions in a code state. The most that can be said is that it is not perfect. This can be said of the practice in any state. The great desideratum to an approximately perfect system of practice in the United States is a uniform and simple system, practically the same in all of the states. This is apparent on account of the fact of the immense extent of our interstate commerce, and the constant necessity of lawyers from one state practicing in another. There is no reason why the principal elements of merit in the reformed system of procedure cannot be combined with the necessary and logical rules of the common-law system, and the two amalgamated into one harmonious and uniform system, which may be followed throughout the various states of the Union.

The chief obstacle in the way of this reform lies in the want of a full understanding of merit and demerit of the different systems, and the prejudice and reluctance on the part of lawyers to exchange anything with which they have become familiar for something that is new; but there is no occasion to construct this system out of anything really new. There is enough already in existence out of which to frame a more excellent system of procedure than has yet been seen.

The chief merit of the code system consisted in breaking down and obliterating the veneration for forms and fictions, and legal technicality, which incumbered and marred the ancient common-law system; but the code system has been heretofore lacking in its requirements of logical and analytical arrangement. There is such a clear distinction between actions upon contracts and actions for torts, and between the principles of law and equity, that there is no reason why these genera and species should not be observed; and the courts are gradually establishing the lines which the legislatures endeavored to obliterate. But any discussion of the question of legal analysis further than to bring in contrast, as nearly as possible, the points of difference between the two systems, would be foreign to this discussion; the object of this

edition of Stephen's Pleading being to place in the hands of American students and lawyers those fundamental rules of pleading in legal actions which are admitted to be essential to the exercise of the art of pleading under any system of law as practiced in the United States.

These, it is believed, will be found to be eminently useful, first, in the actual conduct of lawsuits, and second, in a better comprehension of the underlying principles of both systems; and an experience of many years in active practice warrants the hope that any lawyer of ordinary attainments, who will give attention to these pages, can successfully conduct the most intricate lawsuit through the courts without danger of a slip or failure of justice on account of misleading, in any state in the Union; provided, of course, he acquaint himself with those special rules which exist by statute in his own state and the local works upon the subject of Pleading and Practice.

The object is not to inculcate a veneration for one system or dislike for the other, but to make clear the essential points of resemblance and difference between the systems and the merits of each. This will account for the remark frequently found that "before the code," or "at common law as well as under the code," etc., such and such was the rule. The student must bear in mind that the commissioners who compiled the first code of New York did not invent new rules, but compiled them from the old and then abolished the distinction in forms of action only. As we shall see, there is every reason to believe that they overlooked several common-law rules having a great bearing upon the joinder of parties to actions.

CHAPTER I.

THE JOINDER OF PARTIES.

§ 10. Outline of subject.—A complete treatment of the subject of parties to actions involves a discussion of—

Who is considered in law to be legally interested in the cause of action; *i. e.*, in whom is the right of action.

Where the question involves the decision of *which* one of several persons should sue, whether the action belongs to one or several, it involves the inquiries—

1. Who is legally interested; *i. e.*, who in law is deemed the person injured?

2. When the contract or act which gives rise to the cause of action is made or performed by an agent or representative, who may sue and be sued; and when may all join or be sued; and in what cases is there an election allowed *or* required?

3. Has there been a change of parties by reason of assignment of the right, death of a party, or marriage of a female party?

When the contract upon which suit is brought was made by or with several, or the property involved was owned by several, or the tort, if the action is for a tort, was committed by or against several persons, the question of joinder of parties arises, also the following questions in addition to those above named, *viz.*:

1. Whether the right is held jointly, jointly and severally, or severally.

2. Whether there has been a change—

By reason of the assignment of the rights of any one.

By reason of the death of any proper party.

By reason of the marriage of a female.

3. Whether one who should or might join refuses to join in the suit.

But inasmuch as it is our purpose only to treat of the principles governing the joinder of parties, we include within the

discussion only so much of the law relating to a change of interest by assignment, death, marriage, etc., as is necessary to illustrate the application of these principles, and the change wrought by the provisions of the codes relating to joinder. The student who desires to examine minutely into all the phases of the subject will find a very clear outline and treatment of the subject in Burrill's work on Practice.¹ But before treating the specific subject—the joinder of parties,—it will be necessary to consider somewhat the underlying questions: Who may invoke the judicial power in his behalf, or what constitutes a cause of action? and the rule that actions must be brought by the real party in interest.

§ 11. Who may invoke the judicial power.—Every one whose right is infringed may have an action.² It is said that the end of society is the protection of private right.³ The most important function of the judicial department is the protection of individual rights. Modern thought cannot conceive a perfect right unconnected with the means of judicially protecting it.⁴ This idea has been crystallized into the maxim, *ubi jus ibi remedium*,—there is no wrong without a remedy,⁵—and has become the corner-stone of our judicial system. This maxim is adopted as a part of the common law of England, and must be associated with another idea derived from the Roman law, that the vital principle of a right is found in the obligation to respect it, and the resulting power to enforce this right with the assistance of the state.⁶ This principle takes shape in the constitutions of the United States and of the several states, inhibiting the legislative branch of government from impairing the obligation of a contract, or passing an *ex post facto* law. But neither of these rules, nor both together, require that there shall be a judicial remedy upon every contract.⁷ An apparent exception to the maxim is found in the rule now established, that an individ-

¹ Burrill, *Prac.*, 58-68. See, also, Young, 29 Minn. 474; Mackelday's Chitty's Pl., Maxwell's Code Pl., and Roman Law, div. 1, sec. 13. Bryant's Code Pl.

² 1 Chitty's Pl. 60-66.

³ 1 Black. Com. 123.

⁴ Ashby v. White, *Ld. Raym.* 938,

1 Smith's L. C. 473; 1 Eng. Rul. Cas. 521; Hughes, *Tech. Law*, 8; State v.

⁵ Hughes, *Tech. Law*, 213.

⁶ Bradlaugh v. Gassett, *L. R.* 12 Q. B. 1884.

⁷ Chisholm v. Georgia, 2 Dall. 419; State v. Young, 29 Minn. 474.

ual cannot sue a state unless expressly authorized — a rule which did not always obtain;¹ but this rule is not an exception to the rule, *ubi jus ibi remedium*, for the reason that, as property rights are created by society, and as a state cannot commit a tort, and no right to sue upon contracts being given, one contracting with the public does so knowing that he can have no judicial remedy. A tort can only be perpetrated by a private person, and he — or it, if it be a corporation — may be sued. Property can be taken only by giving just compensation; in such cases the public must be the first to act, and the individual may defend against the public.

The judicial power can be set in motion in civil matters only by some person — using the word in its broadest sense — in a case against another person.² The courts cannot, *ex mero motu*, set themselves in motion,³ nor have they power to decide questions except such as are presented by the parties in their pleadings.⁴ The parties, by their attorneys, make the record, and what is decided within the issue is *res adjudicata*; anything beyond is *coram non judice* and void.⁵

As a corollary of the first proposition, or a negative statement of the same rule, it follows that only those whose rights are infringed can have an action. Not every one benefited by a contract, or who is intended to be benefited by it, may maintain an action upon it. Although he may be deprived of a valuable benefit by the breach of such a contract, he cannot maintain an action for its breach.⁶ To maintain an action upon the part of an individual upon a contract to which he is not a party, the contract must be one in which he has an interest, and he must sustain some special damage not common to others situated as he is.⁷ Neither will the mere

¹ State v. Young, 29 Minn. 474; Hans v. Louisiana, 134 U. S. 1.

⁵ Id. See, also, Jacobson v. Miller, 41 Mich. 90; Cromwell v. Sac Co., 94

² State of Georgia v. Stanton, 6 Wall. 50-78; Luther v. Borden, 7 How. 1; Fletcher v. Tuttle, 150 Ill. 41.

U. S. 351. ⁶ Howsman v. Trenton Water Co. (Mo., 1893), 24 S. W. Rep. 785.

³ Kerfoot v. People, 51 Ill. App. 409; Dicey v. Reed, 78 Ill. 281; United States v. Arredondo, 6 Pet. 709; People v. Liscomb, 60 N. Y. 559.

⁷ Kerfoot v. People, 51 Ill. App. 409 P., Ft. W. & C. Ry. v. Cheevers, 149 Ill. 430; High on Injunc., § 762; Pom. Eq. Jur., § 1379; Hartshorn v. S. Reading, 3 Allen, 501; E. St. Louis v. O'Flynn, 119 Ill. 200.

⁴ Reynolds v. Stockton, 140 U. S. 254; Munday v. Vail, 34 N. J. L. 418.

appropriation and use of a benefit by one person, conferred by another, sustain an *implied assumpsit* to pay for it, and furnish the basis of an action.¹ Nor will the fact that one person receives a financial benefit resulting from a damage to another sustain an *assumpsit*. It must in some manner appear that he voluntarily received the benefit. Damage and benefit resulting from a mere trespass cannot be the basis of an *assumpsit*.² Neither will a damage sustained by one person, caused by another or his property, in all cases sustain an action. This principle is expressed in the maxim, *Damnum absque injuria*. Damage caused by the acts of others must result from a breach of duty due to the person damaged, and constitute an infringement of his rights.³

The rule of law, as well as of equity, in the case of injuries caused by mere accident, or which result incidentally from the performance of a legal right, is that the loss must lie where it falls.⁴ Thus, merely inducing a person to break a contract will not form the basis for an action,⁵ unless some unlawful element enters into the means of inducing the breach; and in such cases the basis of the action is the unlawful act of the one person against the right of the other.⁶ And although in practical effect the result of inducing one person to change a will which provides for a valuable legacy to another causes the legatee a great loss, nevertheless, as he could have no right under a prospective legacy, no matter how illegal, fraudulent or deceitful the representations or persuasions by which the testator was induced to change or destroy it, an action based upon the damage sustained by the failure to receive the legacy could not be sustained.⁷

¹ *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; s. c., Hughes, Tech. Law, 18; *Bartholomew v. Jackson*, 20 Johns. 28, 11 Am. Dec. 237.

² *Cooley on Torts*, 95.

³ *Gibson v. Leonard*, 148 Ill. 182.

⁴ *Cooley on Torts*, *80, 81.

⁵ *Cooley on Torts*, 497; *Kimball v. Harmon*, 84 Md. 407, 6 Am. Rep. 840; *Stanfield v. Jackson* (Ind., 1894), 36 N. E. Rep. 345.

⁶ *Lumley v. Gye* (1853), 2 El. & Bl. 216 (75 E. C. L. R.); *Mechem on Agency*, § 797; *Anson on Cont.*, 210-11; Hughes, Tech. Law, 113. See *Boyson v. Thorn*, 98 Cal. 578; s. c., 21 L.R. A. 233, note.

⁷ *Hutchins v. Hutchins*, 7 Hill, 104; Hughes, Tech. Law, p. 98. *Vide* *Kimball v. Harmon*, 84 Md. 407, 6 Am. Rep. 840. So as to wife's right in insurance policy for her benefit. *K. T. & M. Co. v. Gravett*, 49 Ill. App. 252.

It has been said that a cause of action must include both an injury and a case of damage; but if in truth the plaintiff has sustained an injury—that is, if his right of personal security, or right of private property, has been infringed—it is not necessary in all cases that there should be appreciable damages in order to maintain an action.¹ For every infringement of the right of personal liberty, or personal security, the law imports damages; and wherever the infringement of the right of property is of such a nature that its continuation might ripen into a claim of right upon the part of the perpetrator, or furnish evidence in derogation of the right claimed,² the maxim, *De minimis non curat lex*, does not apply.³ It would avail nothing in such cases to plead that the plaintiff had been benefited.⁴

§ 12. Actions must be prosecuted by the real party in interest.—While the law affords to every one the means of redressing an injury, it is ordinarily required that suit shall be prosecuted in the name of the party injured. This rule results from the maxim that a chose in action is not assignable,⁵ so that the real party could sue in his *own name*; but this was merely a formal matter and required the beneficial plaintiff to sue in the name of the assignor to his use, and in many cases an action for money had and received would lie directly in the name of the assignee.⁶ The modern doctrine in all jurisdictions is that the party in whom is the legal interest must bring the action. This, however, is a generality which lends but little practical aid to the determination of the question, who shall sue in a given instance.

The principles to be observed in determining the question of parties to actions upon contract are different from those to be followed in regard to parties to actions *ex delicto*. It will therefore be necessary to discuss them separately. First, as to parties to actions upon contracts. The rules

¹ 1 Suth. Dam., 8, 9; *Ashby v. White*, Ld. Raym. 938, 1 Smith's L. C. 473; Hughes, Tech. Law, 8.

² *Harrop v. Hirst*, L. R. 4 Ex. 43; 1 Eng. Rul. Cas. 547, and note.

³ Hughes, Tech. Law, 12, 13.

⁴ *Waterman on Tres.*, § 12; *Druley v. Ackens*, 103 Ill. 201.

⁵ *Dicey on Parties* (2d ed.), 80, Rule 6.

⁶ An elaborate note in later editions of Cranch's U. S. Reports gives fully the early law upon the subject. 1 Cranch, App. *428-*448.

applicable to the parties to actions upon simple contracts are the same whether the contract is express or implied.¹ In the theory of the Roman law one person could not represent another. "The person who actually made the contract, who uttered the binding words, or went through the binding formalities, was the only legal contractor; he alone could sue and be sued. The law would not take notice that it was really in behalf of another that he made the contract."² The same idea resulted in the doctrine of privity in English law, but the old doctrine was not so strict as is commonly supposed. The later English cases and the Massachusetts courts, however, hold that only those in privity of contract, or consideration, could maintain an action.³ But long before codes of procedure were adopted the rule had been established in some American courts that the real party in interest should bring the action even though he were not a party to the contract or was not cognizant of it when made.⁴

All that is required in those jurisdictions adopting the modern rule is that the contract must be made for the benefit of the party bringing the suit, or he must be the party entitled to a benefit under it.⁵ Thus, where a contract was made between a railroad company and an express company for the safe transportation of the express matter and the express messengers of the latter company, an express messenger injured by the negligence of the railroad company was allowed to maintain an action upon the contract, which is considered to have been made for his benefit.⁶ The rule, while given a very broad application in some jurisdictions, is not recognized to the same extent in others; consequently no general rule of universal application can be formulated.⁷ The codes have

¹ *Church v. Imperial Gas Light Co.*, 6 Ad. & E. 846.

² *Sandar's Just.* (Hammond's ed.), 457; *Anson, Contracts* (2d Am. ed.), 436.

³ *Dicey on Parties* (2d ed.), 94, Rule 10; *Marston v. Bigelow*, 150 Mass. 45.

⁴ *Schemerhorn v. Vanderheyden*, 1 Johns. 140 (1806); *Pomeroy, Code Rem.* (3d ed.), § 189; *Lawrence v. Fox*, 20 N. Y. 268.

⁵ *Vrooman v. Turner*, 69 N. Y. 280; *Wright v. Terry*, 28 Fla. 160; *Meyer v. Lowell*, 44 Mo. 328; *Howaman v. Trenton Water Co.* (Mo., 1893), 24 S. W. Rep. 784; *Lawrence v. Fox*, 20 N. Y. 268; *Benner v. Weeks* (Pa., 1894), 28 Atl. Rep. 855.

⁶ *U. P. R. R. Co. v. Kelly* (Colo., 1894), 35 Pac. Rep. 923.

⁷ See *Traders' Ins. Co. v. Pecaude & Co.*, 51 Ill. App. 252; *Marston v. Bige-*

wisely dispensed with the shadow and allowed the substance to control in providing that in case of assigned choses the action shall be brought in the name of the assignee.¹

Where it is held that, to sustain an action, there must be privity between the parties, this may be privity arising by contract, or privity arising by operation of law.² In most states an action lies on a promise made by the defendant upon a valid consideration to a third person for the benefit of the plaintiff, although the plaintiff was not privy to the consideration, nor a party to the contract. This principle was established in this country long before the code of procedure was introduced.³ While this is the prevailing doctrine in America, it is not universal.⁴ It has sometimes been held that privity in blood would supply lack of privity in contract or consideration.⁵

It is not essential that the plaintiff knew, at the time the action accrued, of his rights in the premises. When the defendant has in his hands money that in equity and good conscience belongs to another, the question of privity cannot arise.⁶ The law in such a case implies a promise to pay.⁷ Thus, when a purchaser deposits money in the hands of a third person to pay for the thing purchased, the seller may maintain an action against the person in whose hands the money is placed for the sum so deposited.⁸

It is a well-established doctrine that, where two persons enter into a simple contract for the sole benefit of a third, an action will lie in the name of the latter.⁹ But at common law

low, 150 Mass. 45 (5 L. R. A. 49);
Rich. & Ont. Co. v. T. & M. Ins. Co.,
58 Mich. 132; Hathaway v. Orient
Ins. Co., 184 N. Y. 409.

¹ See remarks of Buller, J., in *Master v. Miller*, 4 Term Rep. 340, 1 Smith's L. C. 1377. Stated 1 Cranch (U. S.), App. 424.

² *Alderson v. Ennor*, 45 Ill. 128.

³ *Farley v. Cleveland*, 4 Cow. 432;
Schemerhorn v. Vanderheyden, 1 John. 140; *Lawrence v. Fox*, 20 N. Y. 268; *Mallory v. Gillett*, 21 N. Y. 420;
Pomeroy, Code Rem. (3d ed.), § 139.

⁴ *Marston v. Bigelow*, 150 Mass. 45 (5 L. R. A. 48).

⁵ *Id.*

⁶ 1 Cranch, App., pp. 428-443.

⁷ *Alderson v. Ennor*, *ante*; *Taylor v. Taylor*, 20 Ill. 650; *Spencer v. Towles*, 18 Mich. 9; *Hosford v. Kanouse*, 45 id. 620.

⁸ *Benner v. Weeks* (Pa., 1894), 28 Atl. Rep. 355; *General Mut. Ins. Co. v. Benson*, 5 Duer, 108. See 1 Cranch, App. (U. S.), 424.

⁹ *Moore v. House*, 64 Ill. 163; *Harms v. McCormick*, 80 Ill. App. 125; *Briggs v. Partridge*, 64 N. Y. 357.

and under the codes, in case of sealed instruments, the rule has always been that none but a covenantee may maintain an action upon the contract, though it may have been made for another's benefit.¹ In such cases to allow a principal or *cestui que trust* to sue at will in his own name would destroy the legal relation implied in the case of personal covenants. In such cases neither the legal or equitable rights involved in the contract are vested in the *cestui que trust*.² But the common law did not allow justice to be defeated by a refusal by the trustee to seek a remedy. In such cases the real party interested might use the name of the trustee and prosecute the suit, giving indemnity for costs, and the trustee could not defeat the action by collusively releasing or attempting to dismiss it.³

A telegraph company is a common carrier, and for any breach of its duty to carry messages in a proper and skilful manner it is liable to the party injured, whether he be the sender or the receiver of the message.⁴ There is sufficient privity between the person to whom the message is sent and the company to maintain an action by the former, though the price of transmission be paid by the sender.⁵

In case the cause of action is based upon a chose in action which has been assigned, but which is not negotiable at common law, the real party in interest might sue in the name of the assignor with or against his consent;⁶ or if the assignor was dead, the plaintiff might use the name of his executor or administrator.⁷ The codes in this respect have the effect merely of rendering unnecessary the use of the name of a party who has assigned a chose in action. The provision does not make a chose negotiable in any other sense; it does not

¹ *Gautzert v. Hoge*, 73 Ill. 30; 1 Chitty's Pl. 4; *Pratt v. Thornton*, 28 Me. 355; *Henricus v. Englert*, 137 N. Y. 488.

² *Western Ry. Co. v. Nolin*, 48 N. Y. 513; 1 Chitty's Pl. (16th Am. ed.), p. 4, notes *f* and *k*, and p. 9, note *g*.

³ *Capen v. Barrows*, 1 Gray, 881; 3 Chitty's Gen. Pr., 123, n.; *Sumner v. Sleeth*, 87 Ill. 500; *Mountstephen*

v. Brooke, 1 Chitty, 380, n.; *Berry v. Gillis*, 17 N. H. 9, 43 Am. Dec. 584.

⁴ *W. U. Tel. Co. v. Hope*, 11 Ill. App. 289; *W. U. Tel. Co. v. Carew*, 15 Mich. 525; *West v. W. U. Tel. Co.*, 39 Kan. 93, 7 Am. St. Rep. 530.

⁵ *N. Y. etc. Tel. Co. v. Dryburg*, 85 Pa. St. 298.

⁶ *Mosher v. Allen*, 16 Mass. 457.

⁷ *Grace v. Grace*, 24 Rick. 261, 35 Am. Dec. 319.

change the substantial rights of parties as to set-off, etc., but merely the form of proceeding.

It is not essential that a party suing upon contract should use the same name in bringing the suit which he used in making the contract; for, if he made the contract and is entitled to a benefit under it, he may sue in his own name.¹ But the name used must indicate a legal person, *i. e.*, an entity natural or artificial which the law recognizes as capable of having and owing rights.² Suits by idiots, infants, etc., should add the names of the conservators, guardians, etc.³ It has been decided by the supreme court of the United States that an action cannot be brought in that court in the name of a steamboat.⁴

Every man may at different times, or at the same time, occupy different relations and act in different capacities, and represent separate and perhaps antagonistic interests. In such cases, suing or being sued in one capacity ought not in principle bind him in another capacity, except so far as he would be bound by the doctrine of actual notice.⁵ Generally one is not bound personally by an act done in a representative capacity.⁶

§ 13. Joinder of parties under the common law — Plaintiffs in actions *ex contractu*.— Where a cause of action which according to the fact or the legal fiction indulged in all jurisdictions, allowing a party whose rights are violated to waive the tort and sue upon an implied contract,⁷ is said to arise *ex contractu*, and several persons are interested in the recovery, the question arises, who may or who must join as plaintiffs?

The rules of the common law as to the joinder of parties in actions at law were based upon a strict adherence to the nature of the rights to be enforced, the relation of the parties

¹ *Steinfeldt v. Taylor*, 51 Ill. App. 399. *Fox v. Minor*, 32 Cal. 119; *Hawes on Parties*, § 3.

² *Mexico Mill, etc. v. Yellow Jacket Co.*, 4 Nev. 40, 97 Am. Dec. 510; *Marsh v. Astoria Lodge*, 27 Ill. 421; *Ada St. M. E. Church v. Garsney*, 66 Ill. 182; *Schuetzen Bund v. Agitation Verein*, 44 Mich. 312.

³ *Martin v. Dufalla*, 50 Ill. App. 371; *Lang v. Whiddam*, 2 N. H. 487;

⁴ *Steamboat Burns*, 9 Wall. 237.

⁵ *Rathbone v. Hooney*, 58 N. Y. 467; *Black on Judgments*, § 536.

⁶ *Sluter v. McEnlee* (N. Y., 1894), 36 N. E. Rep. 878. And *vide* cases cited in 38 Cent. Law J. 381.

⁷ See *Election of Remedies*, *post*.

to such rights and the mode of trial; and instead of being excessively technical, illogical and not based upon facts, as is sometimes asserted,¹ were the natural results of the facts constituting the cause of action and the relation of the parties thereto, and their various interests therein, and the adaptability of the issue to be joined between them to trial by a jury;² and in the provisions of the codes, there has not been so radical a departure from these rules as is generally supposed by those who are acquainted only with the provisions of the codes and do not thoroughly understand those of the common law. Those who would understand the code must bear in mind that the facts constituting the cause of action are not changed by the code of procedure. The common law regards a cause of action as an entity or a single thing,³ and the code has not changed this view.⁴ The common law required a cause to be tried upon one or several distinct issues between different acts of parties, while courts of equity, in cases where there was no remedy at law or the legal remedy was inadequate, could take jurisdiction and had the power to adjust all of the rights of the various parties in or to the subject-matter of the litigation; and as the theory of chancery procedure did not contemplate an issue or a jury trial, the chancellor had power to bring before him all the parties interested in the case.⁵

The rules of the common law as to who shall or may be parties to suits have not been abrogated or repealed by the code; they have been modified, but in no sense can the code system be said to be a new or substituted one. Professor Pomeroy expresses the idea happily by calling it a reformed procedure.⁶

Most of the writers upon code procedure admit that to

¹ Pomeroy, *Code Rem.* (3d ed.), W. Ry. v. Adamson, 114 Ind. 283; §§ 192, 198; Bliss, *Code Pl.* (2d ed.), Gardner v. Ogden, 23 N. Y. 327, 78 §§ 61, 62, 63, 73, 75. Am. Dec. 172; U. P. Ry. Co. v. Kelly (Colo., 1894), 35 Pac. Rep. 923.

² See remarks of Seldon, J., *Voorhis v. Child's Ex'r*, 17 N. Y. 358.

³ Dicey on Parties, *38; Scott v. Goodwin, 1 B. & P. 67.

⁴ *Estabrook v. Messersmith*, 18 Wis. 545; *Clark v. Cable*, 21 Mo. 223; *Rainey v. Smizer*, 28 id. 810; 1 B. &

⁵ *Fellows v. Fellows*, 4 Cow. 682-699. See Langdell's *Summary of Eq. Pl.*, § 41.

⁶ *N. Y. & N. H. Ry. v. Schuyler et al.*, 17 N. Y. 592.

understand the provisions of the code one must understand the law and equity rules of procedure from which it is derived. Thus, Pomeroy says¹ these common-law rules remain in force except as modified or abolished by the reformed procedure.

§ 14. The rules for determining what are joint and several rights are strictly rules of substantive law, but are commonly discussed in works upon pleading and damages.² These rules are, however, the bases of determining who shall be parties to actions, and are determined by a consideration of two things: the construction of the language of contracts, or the interest which the parties have in things real or personal. And these considerations are just as important under the code as they were at common law, as appears from the words of the codes.

The important provisions of the codes, so far as the subject in hand is concerned, are three, viz.:

First. All persons having an interest in the subject of the action and in obtaining the relief demanded *may* join as plaintiffs except as otherwise provided.

Second. (It is otherwise provided.) That all parties who are united in interest must be joined.

Third. (A proviso of the second.) But if the consent of any one who *should* be joined as plaintiff cannot be obtained he may be made defendant, the reason thereof being stated.

Happily, in accordance with the plan of this work we may consider these provisions of the code and the common law together, and in this manner elucidate both and show their points of similarity and difference.

What contracts or interests are joint, joint and several, or several? A contract with two or more jointly is not a contract with each or any severally.³ A cause of action arising by the breach of a joint right created by contract, whether it be evidenced by specialty or simple contract, belongs to all.⁴

¹ Pomeroy, Code Rem., § 194. See, also, Bliss, Code Pl. (2d ed.), § 62.

³ Dicey on Parties, 101, 102; Wetherell v. Langston, 1 Ex. 644; Cabell v. Vaughan, 1 Saund. 291.

² See 1 Sutherland on Dam., § 128; 1 Saund. 154-291, and notes; Dicey on Parties, 101-2; 1 Chitty's Pl. 9, 10. The latest presentation is in 1 English Ruling Cases, p. 156, with American notes by Irving Browne.

⁴ Stachely v. Pierce, 28 Tex. 328; Stradfield v. Holliday, 8 Term Rep. 782; Gould on Pl. 197; Clark v. Cable, 21 Mo. 223.

Contracts to which there were more than two parties on one side are either joint, several, or joint and several. The courts determine by rules of construction from the language and the interest of the parties the nature of the contract.¹ It is asserted² that there can be no such thing as a joint and several right given by a contract so that the obligees or promisees may have the option to sue together or alone; but this is a misapprehension. The cases cited are all when the covenant is joint with the obligee, not joint and several; and the cases hold that when the interest and the covenant is joint and several, the plaintiffs may join or sue alone.³ But when the legal interest of the parties is joint and the action is *ex contractu*, the parties, if living, must all be joined.⁴

In case the suit was based upon an implied contract, as in case when the plaintiffs elected to waive a tort and sue in *assumpsit*, the nature of the interest of the plaintiffs determined their right or obligation to join.⁵ It must be observed that the language used does not alone fix the nature of right or obligation. Though the terms of a covenant are joint and several, if the whole instrument shows the interest and the cause of action to be joint, the parties plaintiff must join;⁶ and when the interest of the covenantees is shown by the contract to be several, each may sue alone, though the language is joint;⁷ but if the words are clear, showing an intention to confer a joint or several right, the court will not go outside of the deed.⁸ If part of the covenantees have no beneficial interest, they are required to join or not according to the language used.⁹

When a promise to one partner was declared upon by the firm to be concerning the firm business, and the correspond-

¹ Scott v. Godwin, 1 B. & P. 67.

⁴ Harris v. Swanson, 62 Ala. 299;

² Pomeroy, Rights & Rem. (3d ed.), § 185; 1 Chitty's Pl. (16th Am. ed.), 9, n.; Hays v. Lasater, 3 Ark. 567; Bliss, Code Pl., § 68.

1 Chitty's Pl. 9.

³ Harrison v. Barnly, 5 Term Rep. 249; Hennaker v. Turner, 4 B. & C. 157; Loomis v. Brown, 16 Barb. 328; Sheph. Touch. (Preston ed.) 166; Loomis v. Brown, 16 Barb. 328; Bryant, Code Pl., § 105.

⁵ 1 Sutherland on Dam., § 128; Lee v. Gibbons, 14 S. & R. 105.

⁶ Eccleston v. Clipsham, 1 Saund. 153, n.

⁷ Withers v. Bircham, 3 B. & C. 254.

⁸ Sorbie v. Perk, 12 M. & W. 146; Wooten v. Steffenoni, id. 134; Knightly v. Watson, 3 Ex. 716.

⁹ Anderson v. Morlister, 1 East, 497.

ence, which was the evidence of the cause of action, showed it to relate to firm business, the firm was allowed to recover.¹ And when a carrier contracted with two to assist him with horses of which each owned two, the cause of action for work and labor was held several.²

The student will find the rules as to who are joint or several covenantees stated elaborately in books cited below.³ These rules, relating as they do to the cause of action, and not to the form, are not changed by the codes; and the late cases constantly refer to and rely upon these old cases, whether the rules as to joinder are closely followed, as in the common-law states,⁴ or where they are modified, as in the code states,⁵ or in England, where the reform may be said to be the most sweeping.⁶ It may be appropriately mentioned here that the rule was the same in actions *ex contractu* and *ex delicto*: that all those whose legal interest is joint must, if living, join in the action.⁷

§ 15. Interest and property — Definitions.—The interest which several persons have in things real and personal is constantly mentioned as a controlling element in determining who shall be parties in actions for injuries to property. The common law, the equity rules and the codes constantly use the word “interest” as of controlling influence as to joinder.

The proper legal meaning of the term “interest” should not be overlooked.

Property is to be distinguished from title,⁸ or from the land or chattel or chose which may be the subject of property. Property and interest are very nearly synonymous. Property is the right or interest which one has in or to things.⁹

¹ Garrett v. Handley, 4 B. & C. 664. form in England. See, also, editorial

² Smith v. Hunt, 2 Chitty, 142. comment on same in Law Times,

³ See Dicey on Parties; 2 Saund. 16, Aug. 11, 1894, 330.

and note.

⁴ See 1 Eng. Rul. Cas. 156.

⁷ Harris v. Swanson, 62 Ala. 299.

⁵ Clark v. Cable, 21 Mo. 223. See Allen, 43 N. Y. 387.

⁶ argument in Alexander v. Jacoby, 23 Ohio St. 858; L. B. & W. Ry. v. Adamson, 114 Ind. 288.

⁸ Wynehamner v. People, 13 N. Y. 378; Easton v. B. C. & M. Ry., 51 N. H. 504, 12 Am. Rep. 147; Rigney v. Chicago, 102 Ill. 64; Metropolitan Ry. Co. v. Chicago W. D. Ry., 87 Ill. 318.

⁹ The latest English case noticed is Hannay v. Smurthwaite, 69 L. T. Rep. (N. S.) 677, where the student will find traced the course of re-

Interest, several kinds:

If one person combines in himself complete ownership, *i. e.*, title, interest and possession, he is said to hold in severalty.¹

If several have rights in or to the thing, their titles, nature and duration of their ownership determine the character of their tenancy.

If the nature of their interest, title and the duration of estate and possession is the same, they are joint tenants.²

The estate of coparcenary differed from that in joint tenancy in the manner of creation. Joint tenancy was created by purchase in the legal sense of the term; the title of parceners arises by descent; the unity of interest, title and possession is the same;³ and also in some of its incidents, wherein it resembled tenancy in common, the estate has not preserved its integrity in the laws of the United States.

A tenancy in common is when several become possessed of different interests in things or the same interest, but from different titles and for different periods, so that there is not a complete unity in interest and manner of holding.⁴ It arises in various ways. The interests recognized in personal property are governed by practically the same rules, except, of course, that there can be no parceners in personalty, for personalty does not descend to heirs.⁵

Having noticed the things which controlled in framing the rules of joining parties in action under the common law, we may properly notice two rules of common-law pleading as to joinder and the equity rules, and then we may assume to have a fair understanding of the principles governing the subject.

§ 16. Common-law and code rules as to joinder contrasted. The codes provide that all persons having an interest in the subject-matter of an action and in obtaining the relief demanded may join. The language is *may*, while the other section is that all whose interests are united *must* join. There is considerable conflict of decision among code states as to whether the first clause applied to legal or only to equitable ac-

¹ 2 Cooley's Black. (3d ed.) *178.

⁴ 2 Cooley's Black. (3d ed.) *192;

² Id. *187; *Wentworth v. Remick*,
47 N. H. 227, 90 Am. Dec. 573.

Thompson v. Mawhinney, 17 Ala.
362, 52 Am. Dec. 179; *Montague v.*

³ Id. *187; *Malcolm v. Rogers*, 5
Cow. 194, 15 Am. Dec. 467.

Selb, 106 Ill. 49.

⁵ 2 Cooley's Black. (3d ed.) *399.

tions; but there is a misapprehension on the part of some authors of treatises upon code pleading as to the state of the common law in regard to joinder of parties. Thus, Professor Bliss says: "Nor at common law can parties having only an interest in the subject of the action and in the remedy be united as plaintiffs unless that *interest be joint*."¹ Again, he mentions the common-law rule as confining the union to those having a joint interest;² and further on he says: "It shocks the *prejudice* of the common-law pleaders to speak of a union of plaintiffs when there is not a joint interest."³ So, also, Professor Pomeroy, in his work which is so admirable for style as well as for the originality of some of its propositions, states that the common law was peremptory in the requirement that separate holders of rights must sue alone.⁴ Again, "At common law the different holders of several rights must sue separately although the rights were created by a single instrument, and although there might be some kind of a common interest."⁵ This view of the common law is entirely erroneous. And whether Judge Comstock was right or not in his remark that "The authors of the code, in framing this [the one we are noticing] and most of its other provisions, appear to have had some remote knowledge of what the previous law had been,"⁶ it is certain that the expounders just mentioned were entirely in ignorance of two rules of the common law as to joinder.

It was early established as a rule of pleading that when by an act several persons sustained a common damage, though their interests were not joint, it might be considered as a joint damage, and they were allowed to join in a suit *ex contractu* or *ex delicto*.⁷ The cases cited are strikingly like the case cited by Pomeroy at section 202,⁸ and illustrations put by Bliss.⁹ While the rule of the common law was not so broad as this provision of the code has in some cases been construed to be, it was broad enough to allow a joinder in cases where

¹ Code Pl., § 61.

² Id., § 73.

³ Id., § 74.

⁴ Pomeroy's Code Rem. (3d ed.), § 184.

⁵ Id., § 199.

⁶ 17 N. Y. 604.

⁷ Dicey on Parties (2d Am. ed.),

rule 80, p. 401; Coryton v. Lithebye,

2 Saund. 112-117; Weller v. Baker, 2

Wils. 423; Hoggens v. Gordon, 8

Q. B. 466; Vaux v. Steward, 2 Leon.

12.

⁸ Loomis v. Brown, 16 Barb. 335.

⁹ Code Pl., § 73.

the plaintiffs had a common interest in both the subject of the suit and the damages, though such interest was not joint or equal in degree. In such cases as supposed by Bliss¹ there was never any trouble before the code, for when several were injured by a nuisance and desired to prevent it, a court of equity was the appropriate tribunal. So in the case of different creditors, as will fully appear when we consider the equity rules of joinder.² In the case of tenants in common, if they desired to *prevent* a trespass, and it was of such a nature that the law would interpose, there was no trouble as to joinder. The case of joinder as to tenants in common never presented any difficulty, and is not at all affected by the provision we are discussing.

The case of *Coryton v. Lithebye*³ was a case where several distinct owners of separate mills, situated in the manor of Calliland, brought an action against Coryton because he did not grind his corn at either mill, when by the custom, based upon a prescription, all the inhabitants were bound to grind at one of the mills in the manor. The defendant objected because the ownership of the mills was entirely distinct and separate, and neither could tell his damage; yet they were allowed to join because the damage was joint. Not that they were joint owners of the damage, but they were both interested in the subject and the relief demanded. So in *Weller v. Baker*,⁴ twelve dippers at Tunbridge Wells, who obtained the right to dip by appointment, and had no joint interest in the earnings, brought a joint action against one not appointed for disturbing them in their employment. The court held that though they were each severally entitled to their own several earnings, they were jointly *concerned* in point of interest, and it was a hurt done to them all. Again, in *Vaux v. Steward*,⁵ an action of *assumpsit* brought by several separate owners of cattle which had been distrained, the defendant had promised to procure back the cattle by a time certain but had not; it was held that though the interest of each was several, and the thing to be done several, yet the contract and consideration was joint and the parties could join.

¹ Code Pl., § 78.

⁴ 1 Wils. 423.

² *Post*, p. 42.

⁵ *Stated*, 2 Saund. 117a.

³ 2 Saund. 112-117.

These cases cover the proposition that there might be a joinder in actions at law by parties who were severally interested in the subject of the suit, provided they had a common interest in the relief sought. The cases usually cited by code writers, except such as are based upon causes of action which would have been called equitable, do not extend the rule. Those which extend the rule are cases which but for the code would have been deemed equitable actions.¹

The correct rule is — as stated by Maxwell in his work on Code Pleading — that a joint action cannot be maintained upon several distinct and separate matters, even though they arise out of the same transaction, unless the plaintiffs have a common interest in the question at issue.²

§ 17. Equity rules under the common law and the codes. The limitations set upon the privilege of joining as plaintiffs in equitable actions will make still clearer the common-law rule above referred to, and the provision of the code permitting joinder. The case most commonly referred to is *Fellows v. Fellows*,³ and Judge Sutherland approved the rule as to joinder in equity recognized by the chancellor in *Brinkerhoff v. Brown*,⁴ thus: "The forms of proceedings in chancery, or the power of the court to mold its decrees so as to suit the various equities of the case established by the proof, enable it advantageously to settle and adjust in a single suit rights and interests which, according to the rules of pleading in the courts of common law, would necessarily result in various issues incapable of being tried in a single cause and disposed of in a single judgment. But notwithstanding this disposition of a court of equity to prevent the multiplication of suits, it will not permit several plaintiffs to demand by one bill several matters perfectly distinct and unconnected against one defendant, nor one plaintiff to demand several matters of different natures against several defendants;" and he affirms the reason of the rule "to prevent confusion and to preserve some analogy to the comparative simplicity of a declaration at common law." And he reaffirms the ancient rule that uncon-

¹ *Loomis v. Brown*, 16 Barb. 825;
Rutledge v. Corbin, 10 Ohio St. 478;
School District v. Edwards, 46 Wis.
 150.

² Maxwell's Code Pl. 30.
³ 4 Cow. 682 (1825).
⁴ 6 John. Ch. 139.

nected parties may be joined in a suit where there is one common interest among them all, centering in and upon the issue in the cause. It is not sufficient that the parties have a common interest in some one or more item; they must have a common interest, not in a particular item or isolated charge in the bill, but in the main point in the cause.

These decisions are all based upon several ancient decisions of the English courts.¹ The principles have not been changed or innovated upon. The only question has been as to their application.

These principles which we have just noticed were reaffirmed by the court of appeals of New York in a case arising under the code.²

We have seen that several separate owners might join at law in a suit to recover for the violation of a common right which did them a common damage, although it could not be ascertained what the damage to each might be; and in the case cited Lord Hale gave as one of the reasons that there might not be a double recovery of damages.³ So, in equity, several separate owners of separate properties may join to abate a common nuisance.⁴ The student should not fail to observe that in all these chancery cases there were equitable grounds for relief; that is, there was the equitable right to an accounting for a violated trust, or the appeal to equity to enjoin a nuisance or to prevent a trespass which would constitute an irreparable damage. None of them were suits involving the mere recovery of damages for a past injury unconnected with a trust or fiduciary relation, nor were any of them for the trial of a title.⁵

The remarks of the editor of the London Law Times in relation to the suit of *Haney v. Smurthwaite*⁶ will apply to the question of joinder as we have discussed it. "The moral of the case," he says, "is that, wide as are the powers which liti-

¹ *Ward v. Duke of Northumberland*, 2 Anstr. 469; *Mayor of York v. Pilkington*, 2 Atk. 802.

² *N. Y. & N. H. R. R. v. Schuyler*, 17 N. Y. 592.

³ *Coryton v. Lithebye*, 2 Saund. 112, 117.

⁴ *Peck v. Elder*, 8 Sandf. Ch. 126; *Reed v. Gifford*, Hopkins' Ch. 416. See, also, *Murry v. Hay*, 1 Barb. Ch.

59; *Wood v. Perry*, 1 Barb. 114.

⁵ See *Worthington v. Waring*, 157

Mass. 421, 20 L. R. A. 342.

⁶ 69 L. T. Rep. (N. S.) 677.

gants now possess, a writ of summons is not like an omnibus, into which any one can get as it goes along."

No intention being evinced to destroy the integrity of the cause of action or to abrogate the principles which obtained at common law as to joinder, no one can properly construe and apply the provisions of codes without an understanding of the common-law rules.

§ 18. All who are united in interest must join.— In reference to the second of the code provisions, namely, that all parties who are united in interest must be joined, all agree that this is merely a re enactment of the common-law rule.

§ 19. A necessary plaintiff may be joined against his protest.— It is claimed that the third provision, namely, that if the consent of any one who should have been joined as plaintiff cannot be obtained he may be made defendant, the reason thereof being stated, has made a great change and vast improvement over the common-law rules because of the lack of any remedy at common law in such cases. Thus Mr. Bliss says that unless the common-law rule is modified by this section the rule remains as at law. He lays down the proposition that if one having a joint right refused to prosecute, then there was no remedy at law.¹ Again, he says there is no way by which a party to a joint right can enforce it, either to the entirety or to the extent of his interest, without the cooperation of all survivors who are joined with him in interest.² So, also, Professor Pomeroy says the joint right being conceived of as a single entity, although residing in two or more persons, the judgment must establish or defeat it as a whole. The notion of severing it and establishing a part in favor of certain plaintiffs and defeating a part could not be entertained. Again, that all persons jointly interested must unite as plaintiffs, and no one of them could be permitted to sue alone.³

These expressions are cited to show that there is an evident misconception resulting from the fact that these learned authors were not familiar with several rules of the common law relating to joinder, while their opinions have in some jurisdictions passed as law.⁴

¹ Bliss, Code Pl. (2d ed.), § 62.

² Id

³ Code Rem., § 193.

⁴ Bank of Central City v. Hummel,

It is a general rule of common-law pleading that should one who was a necessary party plaintiff refuse to bring an action, the beneficial parties have a right to use his name without his consent and against his protest on giving indemnity. This was a familiar rule in the case of the assignment of choses in action.¹ So in an equity case it was held that there might be cases where a party was a necessary party *plaintiff*, in which case his name could be used without consent.²

The rule is expressly affirmed in many cases at law, in various forms of action, that, where one necessary joint plaintiff refuses to sue, his co-obligee or promisee might use his name against his consent.³

In cases at law the rule was constantly applied. Thus in *Swigart v. Berk*,⁴ Tilghman, J., says: "The action (which was debt upon a bond) may be brought on the penalty of the bond in the name of all the obligees and the judgment entered in such manner as to secure the separate interests of each. The action may be supported, although some of the obligees have received their shares, because the bond is forfeited unless they have all been paid. It was objected that those who had been paid might refuse to join in the action or might release the obligor; but the court would permit those who were not paid to make use of the names of the other obligees against their consent; neither would their release be suffered to be set up in bar of the action. It may be resembled to the case of an assigned chose in action where the action was brought in the name of the assignor for the use of the assignee; there the release of the assignor would not be regarded. A release in such a case would be collusion."

In *Harris v. Swanson*⁵ the court said: "All courts have an inherent power . . . to protect the rights and interests of those who have *beneficial* interests in the subject-matter of suits."

14 Col. 260-75, quotes Pomeroy's Code Pl., § 199.

¹ *Mountstephen v. Brooke*, 1 Chitty, 890; *Winslow v. Newland*, 45 Ill. 145; *Sumner v. Sleeth*, 87 Ill. 500.

² *Hargrave v. Lewis*, 6 Ga. 207.

³ *Jamison v. Colburn*, 1 Stew. & P. 253 (writ of error); *Harris v. Swanson*, 62 Ala. 299 (action for statutory

penalty); *Darling v. Simpson*, 15 Me. 175 (*assumpsit*); *Hays v. Lasater*, 8 Ark. 567 (covenant on bond); *Wright v. M'Lemore*, 10 Yerg. 235 (*assumpsit* on note); *Gray v. Wilson*, Meigs, 394 (*assumpsit*); *Swigart v. Berk*, 8 S. & R. 308 (debt on bond).

⁴ 8 S. & R. 308.

⁵ 62 Ala. 292.

In *Gray v. Wilson*,¹ which was *assumpsit* for money belonging to two jointly, one accepted payment for his share and the other brought suit in the name of both. After suit the one who had been paid compromised the suit and caused it to be dismissed; the dismissal was set aside, the court saying that the party who had been paid had no right to compromise the suit and dismiss it without the consent of his co-plaintiff. If he had received satisfaction for his part of the amount claimed, still the other plaintiffs had the right to prosecute the suit in the name of all three for their use.

In *Wright v. M'Lemore*,² another Tennessee case, it was said that the co-plaintiff refusing might have released his interest in the note, but he could not be heard to say that he would not permit his co-obligee to use his name in connection with his own to enforce the contract so far as he was interested therein; otherwise, in all cases of contract joint as to the payees, the obstinacy or fraud of one might defeat the remedy of the other. The case also was one where one of the parties stood in the position of the assignee of the chose.

These cases show the error of the notion that the section of the codes allowing parties who refuse to join to be made parties defendant was necessary by reason of the technicality of the common law.

There is no room to speculate as to the intention of the committee who prepared the code, for under section 99 of the original draft of the code the committee have placed this note: "Conformable to the rule prescribed by the supreme court of United States for suits in equity;" and while the language of the section is broad enough to apply to any form of action, it would be absurd to hold it intended to apply to that to which it was essentially unnecessary and inapplicable. The court rule referred to was merely a re-enactment of what was already the law in most equity cases.

The position sustained by the authorities just cited does not in any measure contravene the rule of law that a release by one joint obligee is a bar to an action by any or all.³ One obligee might receive the payment for the debt and execute

¹ Meigs, 394.

² 10 Yerg. 235.

³ C. & N. W. R. Co. v. Nichols, 57

Ill. 467; *Wright v. McLemore*, 10

Yerg. 235; *Austin v. Hall*, 13 Johns.

286; *Hall v. Gray*, 54 Ma. 230.

a release, and this would, whether at common law or under the code, destroy the cause of action and be the basis of a plea in bar.¹ Receiving payment by one joint promisee or obligee of his share of the debt before suit brought had the effect of destroying the joint nature of the contract as to him. There was no rule of law against all of the parties agreeing to a severance of what was originally a joint obligation; and in case of a payment of one share *before suit* brought, and suit upon the obligation by the other obligees without joining the one who had received payment, the consent of all to the severance was implied from the acts of the parties,² but *after suit* one could not compromise the suit and dismiss it without the consent of the other.³

It is quite apparent that the two writers on Code Pleading to whose language reference has been made, have overlooked these provisions of the common law, and that all their remarks are based upon an erroneous assumption of premises. Mr. Pomeroy remarks that some of the judges hold that no change has been made in the common-law rules as to the joinder of plaintiffs.⁴ Professor Bliss is laboring under the same misapprehension. It is possible that the opinion of one reacted on the opinion of the other, and their opinions have had some weight with the judges of different courts.

§ 20. *Joinder of parties.*— Having examined the principles which control and which obtained in determining the question of the proper joinder of parties in actions, it remains to consider somewhat the application of these principles to different instances, bearing in mind that we are not endeavoring to particularize to such a degree as to enumerate every special instance.

The joinder or misjoinder of parties relates to the plaintiffs or defendants in actions *ex contractu*, or to plaintiffs and defendants in actions *ex delicto*.

¹Wright v. M'Lemore, 10 Yerg. 235; Hall v. Gray, 54 Me. 230.

³Gray v. Wilson, Meigs, 394.

²Stedman v. Shelton, 1 Ala. 86; Holland v. Weld, 4 Greenl. 455; Austin v. Walsh, 2 Mass. 405; Baker v. Jewell, 6 Mass. 460; Beach v. Hotchkiss, 2 Conn. 697.

⁴Code Pl., § 204, citing Rainey v.

Smizer, 28 Mo. 310; Voorhis v. Child, 17 N. Y. 354; Hairecht v. Pemberton, 4 Sandf. 657; Van Horn v. Emerson, 13 Barb. 526.

§ 21. **Non-joinder of plaintiffs in actions *ex contractu*.**—In actions *ex contractu*, where several are jointly interested, as we have seen, the cause of action is wholly in them all, and if there is a non-joinder of one who should be a party plaintiff in an action in form *ex contractu*, the consequences at common law were serious, for the defendant, if it appeared on the face of the pleading, might demur,¹ or if the action were upon a deed he could craveoyer of the deed and then demur;² or he could plead the non-joinder in abatement;³ or it could be taken advantage of under the general issue;⁴ or if the record and evidence made the non-joinder appear to the court, the defendant might after verdict move in arrest of judgment,⁵ or the same might be taken advantage of upon a writ of error.⁶

As we have seen, joint tenants in a contract relating to their joint estate or to an entire benefit must join, but mere nominal or ostensible partners having no interest, and dormant partners having no interest, need not be joined. As to tenants in common, the general rule is that they cannot join or be joined in real or mixed actions unless in cases for the recovery of some entire indivisible thing.⁷

§ 22. **Misjoinder of plaintiffs *ex contractu*.**—As to the misjoinder of plaintiffs in actions *ex contractu*, the consequences are equally serious, for misjoinder might be taken advantage of in the same manner.⁸

§ 23. **Non-joinder of defendants *ex contractu*.**—As to the joinder of defendants in actions *ex contractu*, if the contract or interest was joint, all should properly be joined; if several, each should be sued alone; or if the interest or contract was joint and several, the plaintiff might elect, but had not the right to sue an intermediate number.⁹ But this last proposi-

¹ *Eccleston v. Clipsham*, 1 Saund. 58, n.; *Cabell v. Vaughan*, 1 Saund. 391, n.; *Hicks v. Braunton*, 21 Ark. 189; *Pitkin v. Roley*, 43 N. H. 189. See *Baker v. Jewell*, 6 Mass. 46, 4 Am. Dec. 162.

² 1 Chitty's Pl. 13, 14.

³ *Hicks v. Braunton*, *supra*; *Pitkin v. Roley*, *supra*.

⁴ *Ehle v. Perdy*, 6 Wend. 629.

⁵ *Dinet v. Reilley*, 2 Ill. App. 316.

⁶ *Ehle v. Perdy*, *supra*; *Dinet v.*

Reilley, *supra*; 1 Saund. 291; *Dement v. Rokker*, 126 Ill. 174. See, also, *Dockwray v. Dickenson*, 1 Eng. Rul. Cases, 156.

⁷ *Malcolm v. Rogers*, 5 Cowen, 183, 15 Am. Dec. 464; 1 Chitty's Pl. 12.

⁸ 1 Burr. Pr. 64; *Cabell v. Vaughan*, 2 Saund. 16a; *Hennies v. Vogel*, 66 Ill. 401; *Fogg v. Virgin*, 19 Me. 552, 36 Am. Dec. 757. See, also, 1 Eng. Rul. Cases, 166 and note.

⁹ 1 Chitty's Pl. 143.

tion must be taken in a restricted sense. The only way of taking advantage of the fact that a plaintiff was suing the intermediate number was by pleading in abatement, unless that fact appeared upon the record,¹ in analogy to a case of a non-joinder.

In case of a non-joinder of a defendant who should properly have been joined, the other defendants should take advantage of it by a plea in abatement,² unless the defect appears upon the face of the declaration, in which case advantage may be taken of it at any time even upon error.³ *

§ 24. *Misjoinder of defendants ex contractu.*—In case of a joinder of too many defendants, this defect may be taken advantage of at any time by plea in abatement or demurrer, motion for a nonsuit,⁴ motion in arrest, or on error.⁵

§ 25. *Non-joinder of plaintiffs in cases ex delicto.*—Ordinarily, where the injury is to property or property rights and the interest is joint, those jointly owning should be joined as plaintiffs;⁶ but if the interest is several and the damage merely joint, the plaintiffs might join or sever, as we have seen.⁷

Tenants in common are obliged to join in trespass *quare clausum*.⁸ The consequences, however, of a non-joinder were never serious; for while the defendant might compel the plaintiff to join all who were joint in interest, he could only do so by a plea in abatement; and it is frequently held that this is so whether the non-joinder is apparent upon the face of the declaration or not.⁹ But upon this point it seems that if the defect appears on the face of the declaration there should be no reason for compelling the defendant to plead a fact which already appears by the pleading of the opposite party.¹⁰

If the action be one properly and essentially in tort, the fact that all who might sue were not joined is of no conse-

¹ 1 Saund. 291f.

⁵ 1 Chitty's Pl. 44.

² Rice v. Shute, 2 Burr. 261; 1 Smith's L. C. 1405; Backentors v. Stahler, Adm'r, 33 Pa. St. 251, 75 Am. Dec. 592.

⁶ Sheldon v. Kibbe, 3 Conn. 214, 8 Am. Dec. 176; Coryton v. Lithebye, 2 Saund. 112-117.

⁷ See 1 Burr. Pr. 62-64.

⁸ Swigart v. Weare, 37 Ill. App. 259; Cummings v. People, 50 Ill. 132.

⁹ 3 Cooley's Black. 194.

¹⁰ 1 Chitty's Pl. 66.

⁴ 1 Burr. Pr. 169; Hennies v. Vogel, 66 Ill. 401; Manahan v. Gibbons, 10 Johns. 109.

¹⁰ Bell v. Lyman, 1 T. B. Mon. 39, 15 Am. Dec. 83; Cabell v. Vaughan, 1 Saund. 291.

* See note, p. 51.

quence; but if the action, though in form *ex delicto*, necessarily involves as an element of the cause of action the breach of a contract, the same advantage may be taken as if the action were in form *ex contractu*;¹ or the defendant may give in evidence the non-joinder and ask for an apportionment of the damages,² unless those interested as plaintiffs are joint owners, in which case there can be no apportionment.³

§ 26. **Misjoinder of plaintiffs *ex delicto*.**—The rule as to the consequences of a misjoinder of plaintiffs in actions *ex delicto*, and also as to the manner of taking advantage of the misjoinder, is the same as that just stated as applying to actions *ex contractu*.⁴

§ 27. **Non-joinder of defendants *ex delicto*.**—As to who should be *defendants* in actions *ex delicto*, it may be observed that in general there cannot be such a thing as a joint tort, for torts are in general in their nature several.⁵ But where many persons are concerned in the commission of a tort, the plaintiff may ordinarily sue as many or as few as he chooses, and no advantage can be taken of it. The plaintiff may sue each separately, or all together, and may recover separate judgments, but of course can be allowed to have but one satisfaction, though he may elect which one of the judgments he may proceed to collect; and one of the several defendants by paying the money into court cannot bar his right to pursue the defendant he chooses.⁶ But a release given to one, or an election to pursue one by the issuing out of an execution, puts an end to further right of election.⁷ There are, however, cases where the action is based upon contract, and in such cases the same rules as to non-joinder apply as in actions *ex contractu*.⁸ So also joint owners of realty must be joined as defendants in cases of tort by them, or they may plead the non-joinder in abatement.⁹

¹ 1 Chitty, 66.

² Zabriskie v. Smith, 13 N. Y. 322—337, 64 Am. Dec. 551; Whitney v. Stark, 8 Cal. 514, 68 Am. Dec. 360.

³ Id.

⁴ Murphy v. Orr, 83 Ill. 498; K. T. & M. Life Co. v. Gravett, 49 Ill. App. 254.

⁵ 1 Chitty's Pl. 86.

⁶ Livingston v. Bishop, 1 John. 290.

See Cooley on Torts, *140 et seq.

⁷ Dufresne v. Hutchinson, 3 Taunt. 117.

⁸ 1 Saund. 291f; Wright v. Geer, 6 Vt. 151; Rice v. Shute, 2 Burr. 261; 1 Smith's L. C. 1413, note; Hughes, Tech. Law, 170.

⁹ Mitchell v. Tarbutt, 5 Tenn. 649;

§ 28. **Misjoinder of defendants *ex delicto*.**—As to the misjoinder of defendants in actions *ex delicto*, if several be joined in a tort, and the tort described in the declaration is such as could be committed by but one, the defendant may demur, but in such case the plaintiff would have a right to elect to pursue one; and where, in the case just mentioned, the action is based upon contract, there a misjoinder would be as serious as it would be in cases upon contract. The codes have not changed the rules as to the joinder of parties in actions *ex delicto*.¹

§ 29. **Statutes of amendments remove ancient dangers.** Since the passage of the various statutes of amendments a mistake in joining an improper party, or failing to join a necessary party, are not attended with the same fatal consequences as under the ancient common law; but it is usual in the common-law states to allow liberal amendments in matters of form or substance, substituting the name of the party legally interested for that of a party beneficially interested, adding new parties, dismissing improper parties, changing the form of action, or introducing a necessary element into a count. The Illinois statute is a fair example, and the cases will illustrate the application.²

Southard v. Hill, 44 Me. 92, 69 Am. Dec. 85; Sumner v. Tilston, 4 Pick. 308.

¹ Maxwell's Code Pl. *35; Hinkle v. Davenport, 38 Ia. 355; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Lawson's Rights & Rem., § 3435.

² Dickson v. C. & Q. Ry., 81 Ill. 215; Cogshall v. Beasley, 76 Ill. 445; Douglas v. Newman, 5 Ill. App. 518; U. S. Ins. Co. v. Ludwig, 108 Ill. 514; Litchfield Coal Co. v. Taylor, 81 Ill. 590; Ranson v. Henderson, 114 Ill. 528. See App. note, 33.

NOTE.—Since section 28 was stereotyped I have seen the proof-sheets of a decision of the Illinois appellate court contrary to the text; but after carefully examining that case and the case of Rice v. Shute, and especially the notes to the latter case in 2 Sm. Ld. Cas. 1405-16, no reason is found for changing the statement of the text. The decision referred to is Schneider v. Skinner Manuf. Co., 54 Ill. App. 151. See, also, Damron v. Sweetser, 16 Ill. App. 342, sustaining the text.

CHAPTER II.

ELECTION OF REMEDIES.

§ 30. Necessary use of fictions.—It is frequently a nice and important question to determine whether a certain combination of facts constitutes a cause of action upon contract or for a tort; and in cases where no contract is involved, it is often equally important and difficult to determine in what form of action a suit may or must be brought, or what course of proceeding would be the most advantageous for the plaintiff. Notwithstanding the strictures which have been indulged against common-law forms, fictions and technicalities, in determining this question recourse must always be had to what is purely a legal fiction; and these fictions are as much resorted to under the codes as they were at common law. The remarks of a learned lawyer upon these fictions were supposed to be of such cogency and wisdom that the commissioners appointed to draft the code incorporated them in their report. Speaking of the forms of action under the common law, after remarking that the pleadings were almost invariably fictitious and filled with false allegations from beginning to end, he says: "For instance, if one were to rob a person of his watch, the forms of pleading at common law would allow him to waive the tort and bring an action for the value of the watch as upon a purchase. He could charge that on a certain day he sold and delivered to the defendant a certain watch, in consideration whereof the thief promised to pay, when he should be thereto requested, as much as such watch was reasonably worth, and that it was reasonably worth \$250. The defendant would answer *non assumpsit* that he did not promise. Every word in the declaration would be false, and the plea would be manifestly true; and yet there was no judge that would not instruct the jury that, though this was a very outrageous act, the party whose watch it was had the right to waive the wrong, and to have twelve men say on their oaths that the defendant did promise to pay what the

watch was reasonably worth in manner and form as he had alleged." This he characterizes (and truly) a fair specimen of the fiction which existed in the common-law mode of pleading: He could consume hours in giving instances, but considered one sufficient.¹ This is but a fair specimen of the complaint against the fictions of the common law; but as we shall see, the whole doctrine of the election of remedies is pervaded by this same fiction.

Where the election consists in waiving the tort and suing as upon contract, the ancient doctrine of implied contract is invoked.

The doctrine of implied contract itself rests entirely upon a legal fiction. Thus, Mr. Bishop says: "One of the most interesting features of our law is its fictions. Not quite all of them are useful and wise, but most are, and some of them are so essential that they could be dispensed with only at great inconvenience." Of the latter sort he characterizes the fiction of implied contracts. To accommodate the procedure and render the law itself more lucid, the fiction that the law creates in certain circumstances a contract has been recognized rather than invented;² and, as was noticed by the author last quoted, one court has deemed the term "implied" less accurate to designate the legal conclusion drawn than the word "created,"³ but this is not tenable.

§ 31. The doctrine illustrated.—This doctrine is stated by Judge Peckham in a somewhat recent New York case,⁴ where the complaint charged the defendants with taking and carrying away from a mill the machinery therein, and wherein it was held that the action was in its nature *ex contractu* and not *ex delicto* for the wrong done by the plaintiff. The learned judge states the fiction and the reasons for the same admirably, thus: "As the defendants therein had not, after their conversion of it, themselves sold or otherwise disposed of the property which they had acquired of plaintiffs, the fictions of the receipt by the defendants of the money for the sale of the property charged *ex æquo et bono* they ought to pay back

¹ First Report Code Commissioners of New York, p. 70.

² Bishop on Cont., §§ 182, 183.

³ Central Bridge v. Abbot, 4 Cush. 478.

⁴ Terry v. Munger, 121 N. Y. 162, 8 L. R. A. 217, 18 Am. St. R. 808.

to the plaintiffs, and which they impliedly promised to pay back, could not be indulged in, and the position of the parties would have been at one time the subject of some doubt, whether there was any foundation for the doctrine of an implied promise in such case or any possibility of the waiver of tort (trover)¹ committed by the defendants in the conversion of the property." He further notices the conflict of authority, and adds that "the great weight of authority in this country is in favor of the right to waive the tort. "If the wrong-doer has not sold the property, but still retains it, plaintiff has the right to waive the tort and proceed upon an implied contract of sale to the wrong-doer himself, and in such event he is not charged with the money had and received (*indebitatus assumpsit*) by him to the use of the plaintiff. The contract implied is one to pay the value of the property as if it had been sold to the wrong-doer (goods sold and delivered). If the transaction is thus held by the plaintiff as a sale, of course the title of the property passes to the wrong-doer." We may notice that the plaintiff might also have brought trespass.

By this case it will be seen that originally it was only in cases where the property had been sold or disposed of by the tort-feasor, or converted into money or money's worth, that the tort might be waived; and the form of action used in such cases was the common count for money had and received, and the plaintiff, if the defendant still possess the thing, might recover it in specie by replevin, or its value in trover. The doctrine of the New York case just cited very generally prevails throughout the United States.

§ 32. Grounds of the implication.—It is generally held that there must be some basis for the implication of the *assumpsit*, as that the defendant has in some manner voluntarily converted the property of the plaintiff to his own use, or appropriated it in some manner beneficial to him.² The implication is based upon the acts of the defendant and the justice of the matter.

Thus, an action for use and occupation of land will not lie for the mere occupation by a trespasser. There must be some element of voluntarily infringing another's right upon which

¹ These parentheses are added.—Ed.

² *Alderman v. Ennor*, 45 Ill. 123; *Cooley on Torts*, pp. 94, 95.

to base the fiction of the promise to pay the benefit arising from such act,¹ or some conduct which amounts to an evidence of an intention to voluntarily appropriate the property of another before the *assumpsit* will be implied.²

§ 33. **Extent of the right.**— In cases where the injury is one that may be waived, the plaintiff may exercise his election to waive the contract and sue in tort,³ or waive the tort and sue in contract; and although the ancient common-law doctrine was otherwise, the doctrine is now established that the plaintiff may waive a felony and sue either in action of tort or contract, according to his desire.⁴

§ 34. **An election between inconsistent remedies is binding.**— It is important that the most appropriate form of action should be chosen in the first instance; for an election once made, or acts which amount to an election to pursue one or the other of the optional courses, will bind the party to proceed upon that theory, and he will not have the right to afterwards change the same.⁵ The codes, quite as strictly as the common law, require that the plaintiff adopt and adhere to some particular theory of his case, and all his allegations and proof must conform to this theory. He cannot, in an indiscriminate jumble, embrace several forms of action in a single count, but will be compelled to elect as to what single theory he will pursue.⁶ But in order that the commencement of one action should preclude the plaintiff from bringing another, it is necessary that the two actions be inconsistent.

As we have seen, it is not the province of equity to award damages except in cases where the damages are incidental to some other equitable ground of relief;⁷ hence, in case of a continuing damage or nuisance, a party might sue for damages which had already accrued and bring a bill in equity to enjoin the continuance of the nuisance.⁸ And there is no inconsis-

¹ Loyd v. Hough, 1 How. 153.

² Lazarus v. Phelps, 152 U. S. 81.
See *ante*, § 11.

³ Cooley on Torts, p. 90.

⁴ Cooley on Torts, pp. 86-88.

⁵ Keely v. Long, 71 Md. 885, 5 L. R. A. 759; Crossman v. Universal Rubber Co., 131 N. Y. 636, 13 L. R. A.

91, and note; Terry v. Munger, 121 N.

Y. 162, 8 L. R. A. 216, 18 Am. St. R. 803; Cook v. First National Bank, 83 Wis. 31, 35 Am. St. R. 17.

⁶ Supervisors v. Decker, 30 Wis. 624; Ætna Powder Co. v. Hildebrand (Ind., 1894), 37 N. E. Rep. 136.

⁷ Worthington v. Waring, 157 Mass. 421.

⁸ 3 Cooley's Black. (3d ed.) 220

ency in pursuing several remedies having as their object the attainment of the same thing, *e. g.*, a bill in chancery to set aside a contract of credit in a purchase of goods, an attachment, and also an action for the purchase price.¹ The election is required only of inconsistent remedies.²

§ 35. Considerations governing selection of remedy.—

In order to properly determine the form of action to be pursued, or, to put it in more technical language, to make the proper election, it is necessary, as well under the code as in the common-law states, to have in mind the different ways in which the choice of the remedy is likely to become important.

(a) *Disability*: In case the party to be sued is a single person, it may be important, if the party is an infant, or *non compos mentis*, or a married woman, to select a form of tort under the well-known doctrine that such persons are liable for their torts, though they may not be in form *ex contractu*.

(b) *Death*: Again, the death of a party may control, under the principle of law that personal torts do not in all cases survive. This principle requires that in some instances the form *ex contractu* should be adopted; and under the modern doctrine, which appears from the cases we shall notice under subdivision (e) the breadth of the doctrine is being extended by construction. An interesting case was recently decided by the court of Colorado. K., an express messenger, was injured by the Union Pacific Railroad Company, and sued it in the United States circuit court in tort for damages on account of personal injuries, which suit abated on account of his death. His administratrix brought another suit against the company, based upon a contract between the Pacific Express Company and the defendant, imposing upon the latter the duty to carry the express messengers. The defendant pleaded the other suit as *res adjudicata*. The court quite clearly distinguished between that case and a case involving property, holding that this was not a case where the party had an election of remedies or could be held to an election, but that the cause of action in tort for the negligent injury was an entirely distinct and separate cause of action, and held the plea of *res adjudicata*.

¹Crossman v. Universal Rubber Smith's L. C. 198; Hughes, Tech. Co., 181 N. Y. 636, 13 L. R. A. 91. Law, 189. See Wilson v. Pearson, 20

²Smith v. Hodsen, 4 T. R. 211, 2 Ill. 81.

cata bad, thus holding that by reason of this contract the suit survived to the estate of the deceased.¹

(c) *Statute of limitations*: It may frequently happen that the statute of limitations would bar an action in tort where it would not in contract, or an action brought for the recovery of specific property where it would not an implied *assumpsit* for its value. It will be noticed that in some jurisdictions the form of the statute of limitations is against particular forms of action, while in other jurisdictions the statute limits the time for bringing action in relation to the cause of action.²

(d) *Set-off, recoupment, etc.*: The existence or non-existence of some claim for damages by the proposed defendant which he might set up by way of recoupment, set-off or counter-claim might influence the pleader in the form of action which he would adopt, or at least deter him from bringing his action; for ordinarily a plaintiff could not avoid a set-off by bringing his suit in tort for a matter arising in contract; but a tortfeasor would have no right to insist that, simply because the plaintiff had a right to bring his action upon contract, he might therefore set off any account he had against the plaintiff.³

(e) *The nature and amount of damages which may be recovered* under one form of action rather than another is perhaps the most usual motive for considering what form of action is best to adopt, and this does not always depend upon a mere election between the forms of action *ex contractu* or *ex delicto*, but involves another element as to whether a certain action shall be brought which at common law would be in form trespass *de bonis asportatis* or trespass *quare clausum fregit*, or a choice of two actions which might both be in contract or in tort, for instance.

Perhaps the most difficult phase in which this question arises is that presented when a passenger sues a carrier for injuries sustained by the passenger by reason of the negligence of the common carrier which has contracted to carry him safely to his destination. In such a case, which is but the application of a principle applying to many other cases, by suing in tort for the negligence, a plaintiff is allowed to recover other and different damages than he might recover if the action were

¹ Union Pac. Ry. Co. v. Kelly (Colo., 1489), 85 Pac. Rep. 923.

² Carroll v. Green, 92 U. S. 509.

³ Norden v. Jones, 33 Wis. 600.

brought for a breach of contract. For instance, a recovery in tort might include more remote and consequential damages, and there might exist grounds for the recovery of punitive or exemplary damages. There has not been an entire unanimity of opinion and decision as to the right in such cases to assume the form of action *ex delicto*. Probably the leading American case in which the right of election is allowed is the case of *Brown v. C., M. & St. P. Ry. Co.*,¹ in which case the doctrine is elaborately discussed, and the rule which is adhered to in most of the states established.² Substantially the same state of facts involved in the Wisconsin case was held by the English court not to allow a suit to be brought upon tort, but such a suit was held to be in contract.³ The English doctrine was adopted by the supreme court of Colorado.⁴

One whose goods are unlawfully taken has various courses open to him. He may sue in trespass for the unlawful taking or may replevin the goods, or may sue for their value, as was noticed in the case of *Terry v. Munger*;⁵ or, if the property had been converted from the original form in which it was taken, the plaintiff might still replevin it in its new form, although its value had been increased by reason of labor bestowed upon it.⁶

Upon a like principle, one whose trees or crops have been destroyed by the negligence or trespass of another may bring an action in the form of trespass *de bonis* or *assumpsit* for the value of the property destroyed, or he may maintain an action for injury to the real estate, in which forms of action the measure of damages will be different.⁷ Or where ore or coal has been taken from the ground the owner may exercise the same election,⁸ or he may, in such cases, bring an action of trover.⁹

Where a contract for services, as a laborer, contractor, etc.,

¹ 54 Wis. 343, 41 Am. Rep. 41.

² See *C., H. & I. Ry. v. Eaton*, 94 Ind. 475, 48 Am. Rep. 179; *Evans v. St. L., I. M. & S. Ry.*, 11 Mo. App. 463.

³ *Hobbs v. London & S. W. Ry.*, L. R. 10 Q. B. D. 111.

⁴ *Pullman P. C. Co. v. Barker*, 4 Colo. 344, 34 Am. Rep. 89. See also,

1 *Suth. on Damages* (2d ed.), 72.

⁵ 121 N. Y. 163; *ante*, § 31.

⁶ *Davis v. Easley*, 13 Ill. 193; *Baker v. Wheeler*, 8 Wend. 505; 24 Am. Dec. 66; *Harms v. Stier*, 51 Ill. App. 234.

⁷ *Bailey v. C., M. & St. P. Ry.* (S. Dak.), 19 L. R. A. 653.

⁸ *Omaha, etc. Co. v. Tabor*, 13 Colo. 41, 5 L. R. A. 236.

⁹ *Id.*

is broken, there are generally several remedies open to the plaintiff. He may bring an action in *assumpsit* upon a *quantum meruit* for the services performed, or an action for the breach of the contract and damages may be brought; or, in case of a wrongful discharge, he has the option to wait until the period contemplated by the contract for the completion of the work had expired, and then sue for the contract price;¹ but an action of special *assumpsit* upon the contract is inconsistent with one upon the *quantum meruit* or *valebant*.²

So, also, for another and entirely different character of an injury, the plaintiff might sue in an action of trespass on the case for seduction and recover for the loss of the services, or he might bring an action of trespass *quare clausum fregit* with an allegation of *alia enormia* (and other wrongs then and there did), or trespass *vi et armis*, and recover for the same offense different measures of damages.³ Examples might be multiplied, but these will be sufficient to illustrate the principles, and will enable the student to readily apply these principles to other cases. The subject will receive further treatment and illustration in the pages of the text and notes thereto under the discussion of the form of action.

(f) *The nature and extent of the remedy* may influence a choice of the action selected, as in most of the states a *capias ad respondendum* may issue as process in cases of fraud, or in form *ex delicto* when such a remedy would not be allowed in an action *ex contractu*. So in the action of account, wherever that action is in use, it is usual to compel the appearance of the defendant, and his obedience to the order to account, by attaching his person.⁴

That the common-law principles in regard to the election of remedies are of universal application and equally as important under the codes as under the common-law procedure will

¹ *Keedy v. Long*, 71 Md. 385, 5 L. Hun, 489; *Distley v. Dabney*, 8 Wash. R. A. 759; *Knutson v. Knapp*, 35 Wis. 86; *Hochster v. De la Tour*, 2

El. & Bl. 678; *Hughes*, Tech. Law, 87. ² *Baggle v. Illsley*, 127 Mass. 191; *White v. Murtland*, 71 Ill. 280.

³ *Id.*; *Long v. Doxey*, 50 Ind. 386; *Richardson v. Coffman* (La.), 54 N. W. Rep. 356; *Woolsey v. Ellenville*, 69

⁴ 1 Paine & Duer's Pr. 2; 1 Starr & Curtis, Ill. Stat. 188; 1 Burrill's Pr. 23; 1 Cooley's Black. (8d ed.) *162.

appear from the cases cited, but the necessity in code practice of observing these forms and fictions, and the distinctions which existed between the different *forms of action* under the common law, will be even more apparent by an examination of the discussion of this doctrine of election in any of the many works upon code procedure.¹ The remark of Justice Grier, that it is beyond the power of legislative omnipotence to compel lawyers not to distinguish between things that are different, is no more true now than it was in 1857, but its truth is more apparent.

¹ Pom. Code Rem. (3d ed.), §§ 558-567.

PART II.

**FORMS OF ACTION, AND THE PROCEEDING IN AN
ACTION FROM COMMENCEMENT
TO TERMINATION.**

SYNOPTICAL OUTLINE

OF THE

PROCEEDINGS IN AN ACTION.

PROCEEDINGS IN COURT.

1. *Præcipe* (pp. 68-69).
2. Original writ (p. 69).
3. Judicial process (p. 97).
 1. Personal summons.
 2. *Capias ad respondendum* (p. 98).
 3. Constructive notice.
 4. Attachment of property.
4. Appearance (p. 100).
 1. In person (p. 104).
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5. Pleadings (p. 102).
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 1. General.
 2. Special.
 3. Pleas (p. 136).....
 4. Joinder in demurrer (p. 149).
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6. Trial (pp. 171-186).
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 1. By jury (pp. 171-178).
 2. By the court.
 1. Demand of view (p. 187).
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 6. Withdrawing a juror (p. 196).
 7. Objections, exceptions and bill of exceptions (p. 178).
 8. Demurrer to evidence, motion to exclude (p. 180).
 9. Directing a verdict (p. 186).
7. Verdict (p. 177).
 1. General (p. 180).
 2. Special (p. 180).
8. New trial (p. 188).
9. Arrest of judgment (p. 186).
10. Judgment *non obstante* (p. 186).
11. Repleader (p. 186).
12. *Venire facias* (p. 186).
13. Judgment (p. 191 *et seq.*).
 1. Interlocutory.
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14. Execution (p. 200).
15. Appeal and writ of error (p. 201 *et seq.*).

SYNOPTICAL OUTLINE OF THE PROCEEDINGS IN AN ACTION—*Continued.*

	<ol style="list-style-type: none"> 1. To the jurisdiction (p. 136). 2. In suspension (p. 128, n.). 	
1. Dilatory.	<ol style="list-style-type: none"> 3. In abatement (pp. 139, 140). 	<ol style="list-style-type: none"> 1. To person of plaintiff. <ol style="list-style-type: none"> 1. That he is fictitious. 2. That he is an alien enemy. 3. That he is dead. 4. That he is misnamed. 5. That he is under disability to sue in form adopted. 6. Misjoinder or non-joinder. 2. To person of defendant. <ol style="list-style-type: none"> 1. Disability to sue. 2. Misjoinder or non-joinder. 3. Privity. 3. Declaration. 4. To the writ (p. 139). <ol style="list-style-type: none"> 1. Variance. 2. <i>Autre action pendant</i>. 3. Suit prematurely brought.
2. Peremptory (p. 145).	<ol style="list-style-type: none"> 1. Traverse. 2. In confession and avoidance. 	
3. Anomalous (p. 154).	<ol style="list-style-type: none"> 1. <i>Puis darrein continuance</i>. 2. Further continuance. 3. In estoppel. 4. Demand ofoyer. 	

NOTE.—For the order in which these pleas are to be pleaded see page 220.

SYNOPTICAL OUTLINE
OF THE
FORMS OF ACTION.

<p>REAL AND MIXED (pp. 61-65).</p>	<p>1. Involving possession and damages.</p> <p>2. Involving possession, title and damages.</p>	<p>Forcible entry and detainer (p. 63).</p> <p>(1) Waste (p. 71). (2) Writ of entry (p. 72). (3) Trespass to try title (p. 74). (4) Writ of dower (p. 66). (5) Ejectment (pp. 83-97).</p>
<p>PERSONAL* (pp. 61-77).</p>	<p>1. Actions <i>ex contractu</i>.</p> <p>2. Actions <i>ex delicto</i>.</p>	<p>(1) Debt (p. 77). { a. In the <i>debit</i>. d. In the <i>detinet</i>. (2) Covenant (pp. 77, 78). (3) Account (pp. 78, 79). (4) <i>Assumpsit</i> { a. General. pp. 85-87. } b. Special.</p> <p>(1) Detinue (pp. 79, 80). (2) Trespass (pp. 80-83). { a. <i>Vi et armis</i>. b. <i>De bonis asportatis</i>. c. <i>Quare clausum fregit</i>.</p> <p>(3) Trespass on the case (p. 83). { a. Trover (pp. 87, 88). b. Libel (pp. 123-125). c. Slander. d. Malicious prosecution (pp. 125, 127). (All actions for the redress of a personal wrong occasioned by non-feasance or misfeasance where direct force is not the ground of the action. See p. 68 and note.)</p> <p>(4) Replevin (pp. 92, 93). { a. In <i>cepit</i>. b. In <i>detinet</i>.</p>

*The reader will notice that our author does not divide personal actions into those *ex contractu* and those *ex delicto*. This classification has come into use in a later day. In the text, *assumpsit* is treated, according to its origin, as a form of trespass on the case, together with trover, libel and other actions on the case.

CHAPTER III.

(ORIGINAL CHAPTER I.)

OF THE PROCEEDINGS IN AN ACTION, FROM ITS COMMENCEMENT TO ITS TERMINATION.

§ 36. The division of actions.—Actions¹ are divided into *real*, *personal*, and *mixed*. (a)² *Real* actions are those brought for specific recovery of lands, tenements or hereditaments; *personal* are those brought for specific recovery of goods and chattels, or for damages or other redress, for breach of contract, or other injuries, of whatever description, the specific recovery of lands, tenements and hereditaments only excepted. *Mixed* actions are such as appertain, in some degree, to both the former classes, and therefore are properly reducible to neither of them, being brought both for specific recovery of lands, tenements or hereditaments, and for damages for injury sustained in respect of such property. Again, in *real* actions, there is a division between those founded on the *possession* and those founded on the absolute *property* or *right*. (b)

§ 37. The superior courts of England.—There are three superior courts of the common law, in each of which actions may be brought. These are the king's bench, the common pleas, and the exchequer,—each consisting, at present, of

(a) Bract. 101, b; 3 Cooley's Black. (2d ed.) 117.

(b) Earum quæ sunt in rem, quædam proditæ sunt super ipsa possessione, et quædam super ipsa proprietate; est enim possessio rei, et proprietas. Bract. 103, a.

¹ This word "action" is very broad in its meaning and embraces everything within judicial remedies. See Walker's Am. Law (9th ed.), § 208; Burrill's Prac. 2, 8.

² The distinguishing feature between real and personal actions was not simply that one related to real estate and the other to things personal. The real action had for its sole object the recovery of the possession of land or to adjudicate the

title to land, while all personal actions might end merely in damages. An action to recover a specific chattel might be supposed to be a real action but for the fact that in no case was the defendant required absolutely to restore the thing, but to restore it or respond in damages for its value. See 1 Reeves' Hist. Com. Law (Finlanson ed.), p. 336, n. See, also, Langdell's Sum. Eq. Pl., § 40.

four judges. The original distribution of business among them, upon their first establishment, was as follows: The cognizance of crime, and of such matters of litigation in general as directly concerned the crown (those relating to the revenue excepted), was exclusively appropriate to the court of king's bench; civil suits between subject and subject (called *communia placita*) to the common pleas; and matters relating to the royal revenue, to the exchequer.(c) In course of time, considerable violations of this arrangement took place, usurpation on the province of the common pleas being made by each of the other courts. Of these changes the general result is as follows: The king's bench has now jurisdiction not only in those matters which belonged to it by its original constitution, but in *all personal actions whatever*. The case is the same with the exchequer; but both these courts are still excluded from the cognizance of actions *real* and *mixed*.(d) The common pleas retains its original province, and therefore entertains all actions whatever between subject and subject, whether of the real, mixed, or personal class.

§ 38. The original writ and form of action in England.—

An action is commenced in the king's bench or common pleas either by *original writ* or by *bill*; in the exchequer, by *bill* only.¹ Of these methods of proceeding, the former is the regular and ancient one; and the latter is in the nature of an exception to it. The proceeding by *original writ* consequently claims the first notice.

An *original writ* (*breve originale*) is a mandatory letter issuing out of the court of chancery,² under the great seal, and

(c) Introd. to Sellon's Pract., sec. XXIV; 3 Bl. Com. 44.

(d) Hales' Disc. of the K. B. and C. P. (in Harg. Law Tracts), ch. IV. With respect, however, to the king's bench, this author excepts the following mixed actions: *Assise*, *Ejectio firmæ*, and *Ejectio custodiæ*.

¹ Spence, Eq. Jur. 226 and note.

² An understanding of the nature and office of the original writ as used in England is essential to a proper understanding of some of the older rules of pleading, e. g., conforming to the writ, and a seemingly unnecessary strictness in amendment. The statement of the text that the writ issues out of the court

of chancery, while correct in a sense, is misleading. Before there existed any court of chancery for the granting of equitable relief there was a chancellor, who was the chief officer of all the king's courts, and to him was confided the great seal. The king as fountain of justice dispensed justice in his courts and the suitor must obtain the king's consent

Bill?
Chitty

in the king's name, directed to the sheriff of the county where the injury is alleged to have been committed, containing a summary statement of the cause of complaint, and requiring him, in most cases, to command the defendant (*e*) to satisfy the claim; and, on his failure to comply, then to summon him to appear in one of the superior courts of common law, there to account for his non-compliance. In some cases, however, it omits the former alternative, and requires the sheriff simply to enforce the appearance.

One object of the original writ, therefore, is to *compel the appearance* of the defendant in court; but it is also necessary as *authority for the institution of the suit*; for it is a principle (subject only to the exception introduced by the practice of proceeding by *bill*), that no action can be maintained in any

(*e*) It may be observed here, that in a *personal* action the parties are called *plaintiff* and *defendant*; in a *real* action, more properly *demandant* and *tenant*. The former terms, however, are applicable in actions of every description, and are those commonly employed when a suit is mentioned generally, without reference to its particular nature.

and the direction of what course to pursue, by an application to the chancellor, from whom he purchased the original writ, as pointed out by Stephen. The writ was the only warrant of authority for the particular court to "hold the plea," or, as we would say, try the cause. 1 Spence, Eq. Jur. 228; 3 Reeves' Hist. Eng. Law (Finlanson ed.), 150, note. And, as it described the cause in almost the same form as the declaration, it was the duty of the court to have all the proceedings conform to it; as it was jurisdictional, no power of amendment could go beyond it, and if the trial court exceeded his jurisdiction or did not do justice, an appeal would lie to the king, *i. e.*, the case came back to where it started. 1 Spence, Eq. Jur. *111. After the extraordinary jurisdiction in equity was confided to the chancellor, who presided over a separate court, the old duty of issuing writs was not taken away, and hence it is said that these writs issue out of the court of

chancery. From this expression it might be supposed that the court of chancery had a sort of supervision over the law courts; but this was an ancient duty of an ancient officer. When the jurisdiction of the law courts became fixed and established by law the reason for the old writ failed, and since then all that is required is that the declaration follow the summons. 1 Spence, Eq. Jur. *228.

In the United States the constitution creates the courts and fixes the limits of judicial jurisdiction, hence there is no such thing as an original writ in the English sense; but the suitor files his *precipe* and obtains a judicial writ as his first process (2 Bouvier's Institutes, §§ 2789-93), and in some code states they have returned to the ancient Saxon simplicity of allowing the suitor to serve the defendant with an original notice and copy of the complaint. See 1 Spence, Eq. Jur. *62.

superior court without the sanction of the king's original writ: the effect of which is to give cognizance of the cause to the court in which it directs the defendant to appear. (f) To sue out an original writ is, consequently, the first step taken in the suit. It is the business of the plaintiff to sue it out, and he obtains it as a matter of course; upon payment, however, to the king of a *fine* proportionate to the amount of the demand in the action.

The original writs differ from each other in their tenor, according to the nature of the plaintiff's complaint, and are conceived in fixed and certain forms. Many of these forms are of a remote and undefined antiquity, but others are of later origin, and their history is as follows: The most ancient writs had provided for the most obvious kinds of wrong; but in the progress of society, cases of injury arose, new in their circumstances, so as not to be reached by any of the writs then known in practice, and it seems that either the clerks of the chancery (whose duty it was to prepare the original writ for the suitor) had no authority to devise new forms to meet the exigency of such new cases, or their authority was doubtful, or they were remiss in its exercise. (g) Therefore, by the Statute Westminster 2, 13 Edw. I., ch. 24, it was provided, "That as often as it shall happen in the chancery that in one case a writ is found, and in a *like case* (*in consimili casu*), falling under the same right, and requiring like remedy, no writ is to be found, the clerks of the chancery shall agree in making a writ, or adjourn the complaint till the next parliament, and write the cases in which they cannot agree, and refer them to the next parliament, etc. This statute, it will be observed, while it gives to the officers of the chancery the power of framing new writs *in consimili casu* with those that formerly existed, and enjoins the exercise of that power, does not give or recognize any right to frame such instruments for cases *entirely new*. It seems, therefore, that for any case of that description no writ can be lawfully issued, except by authority of parliament. But on the other hand, new writs were copiously produced, (h) according to the principle sanctioned

(f) Non potest quis sine brevi agere. Bract. 412, b; Gilb. Hist. C. P. 2; 3 Bl. Com. 272.

(g) Vide 2 Reeves, 208; 3 Bl. Com. 40; 8 Rep. 48, 9.

(h) 3 Cooley's Black. (3d ed.) 51; 8 Woodd. 168; 4 Reeves, 430.

by this act, *i. e.*, *in consimili casu*, or upon the analogy of actions previously existing; and other writs also, being added from time to time, by express authority of the legislature, large accessions were thus, on the whole, made to the ancient stock of *brevia originalia*.

All forms of writs once issued were entered from time to time and preserved in the court of chancery, in a book called The Register of Writs, (*i*) which in the reign of Henry VIII. was first committed to print and published. (*k*) This book is still in authority, as containing, in general, an accurate transcript of the forms of all writs as then framed, and as they ought still to be framed in modern practice. It seems, however, that a variation from the Register is not conclusive against the propriety of a form, if other sufficient authority can be adduced to prove its correctness. (*l*)

An original writ (as already stated) is essential to the due institution of the suit. (*m*) These instruments have consequently had the effect of limiting and defining the right of action itself; and no cases are considered as within the scope of judicial remedy, in the English law, but those to which the language of some known writ is found to apply, or for which some new writ, framed on the analogy of those already existing, may, under the provision of the statute of Westminster 2, be lawfully devised. The enumeration of writs, and that of actions, have become in this manner identical. (*n*)

The *law of actions*, comprising their more particular divisions, and the rules as to their respective competency in different cases, the proper parties to the suit, and the power of joining different claims or demands¹ in the same writ, is a subject which it is not necessary here to discuss, the object of this work being only to treat of those general and fundamental rules of pleading which are applicable to all actions alike. In order, however, to the subsequent illustration of these rules, it will be proper to present the reader with examples of such

(*i*) 3 Bl. 183; 4 Reeves, 426; Gilb. Hist. C. P. 4.

(*k*) 4 Reeves, 426, 432.

(*l*) Bac. Ab. Abatement, H.; 4 Reeves, 432.

(*m*) *Supra*.

(*n*) See Appendix, note (2).

¹ See Joinder of Counts.

of the forms of original writs as most frequently occur in modern practice.

§ 39. **Writ of right.**—The *real* and *mixed* actions which, in modern times, have perhaps come most frequently into use, are those of a *writ of right*, *formedon*, *dower*, and *quare impedit*.¹ The *writ of right*² is the remedy appropriate to the case where a party claims the specific recovery of corporeal hereditaments in fee-simple; founding his title on the right of property, or mere right, arising either from his own seisin or the seisin of his ancestor or predecessor. (o) Its form is as follows:

(Original.) WRIT OF RIGHT.³

George the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, and so forth, to the Sheriff of —, Greeting:

Command C. D. that justly and without delay he render unto A. B. four messuages, four gardens and four acres of land, with the appurtenances, in the parish of —, in the county of —, which he claims to be his right and inheritance, and whereof he complains that the aforesaid C. D. unjustly deforces him. And unless he shall so do, and if the said A. B. shall give you security of prosecuting his claim, then summon by good summoners the said C. D., that he be before our justices at Westminster (p) in eight days of Saint Hilary, to show wherefore he hath not done it; and have you there the summoners and this writ.

Witness ourself, at Westminster, on the — day of —, in the — year of our reign. (q)

§ 40. The writ of *formedon* lies where a party claims the specific recovery of lands and tenements, as issue in tail; or

(o) F. N. B. 1 B.; 3 Bl. Com. 191. As to the "right of property, or mere right," *vide supra*, p. 61. The writ here mentioned is the writ of right *quia dominus remisit curiam*, which is the principal and most usual species. As to this and the other species of the writ of right, see 1 Arch. 402, 418; 3 Chitty, 635.

(p) By "our justices of Westminster," or "our justices of the Bench at Westminster," is intended, in writs, the court of common pleas.

(q) Arch. 404; 3 Chitty, 635; Tysen v. Clarke, 3 Wils. 558.

¹ Real actions, formerly called *feudal* actions, were abolished in England, with few exceptions, by 3 & 4 Will. IV., c. 37, § 38. at common law, in the states of New York, Colorado, Illinois, Michigan. Newell on Ejectment, 56 et seq. See Ex parte Bradstreet, 7 Pet. 634.

² Ejectment may now be brought under the statute, in all cases where the writ of right might be brought. ³ This is the original writ; notice the conclusion: "Witness ourself, at Westminster," etc.

as a remainder-man, or reversioner, upon the determination of an estate tail. (r) Its form is as follows: (s)

(Original.) WRIT OF FORMEDON.

George the Fourth, etc., (t) to the Sheriff of —, Greeting:

Command C. D. that justly and without delay he render unto A. B. the manor of N., with the appurtenances which E. F. gave to G. B. and the heirs of his body issuing, and which, after the death of the said G. B., ought to descend to the said A. B., the son and heir of the said G. B., by form of the gift aforesaid, as it is said. And unless he shall so do, and if the said A. B. shall give you security of prosecuting his claim, then summon, by good summoners, the said C. D., that he be before our justices at Westminster, in eight days of Saint Hilary, to show wherefore he hath not done it; and have you there the summoners and this writ.

Witness ourself, at Westminster, on the — day of —, in the — year of our reign. (u)

§ 41. The writ of dower lies for a widow claiming the specific recovery of her dower, no part of it having been yet assigned to her. (x)¹

(r) Co. Litt. 326, b; Booth, 130, 151, 154.

(s) The form here given is that of formedon in *descender*, viz.: that brought by the issue in tail; when the action is at suit of the remainder-man or reversioner, it is called a formedon in the *remainder* or in *reverter*, and the form of the writ varies accordingly.

(t) The king's title is set forth in this, and all the following writs, in the same form as in the writ of right.

(u) Booth, 141.

(x) The writ here mentioned is the writ of dower *unde nil habet*, which is the principal species, and the only one known in practice. There is another called a *writ of right of dower*, which applies to the particular case where the widow has received part of her dower from the tenant himself, and of land lying in the same town in which she claims the residue. Booth, 166; Glan. Lib. 6, c. 4, 5.

¹ The action to recover dower was one of the three real actions which survived in England the repealing statute 8 & 4 William IV., chapter 7, section 36. See 1 Washb. Real Prop. (5th ed.), p. 290. By the common-law procedure act of 1860 a writ of summons was substituted in England. It is still retained in Massachusetts. Pub. Stat., ch. 178, § 1.

As the right or estate of dower is recognized in America, it follows that there is a judicial means of protecting it. "At common law," says Mr. Newell in his excellent work on

Ejectment, "the assignment of dower was enforced by a writ of *unde nihil habet*, or by writ of right of dower against the tenant of the freehold, and if judgment was obtained by the widow she could then recover her possession in an action of ejectment. Park on Dower, 283; 2 Scrib. on Dower, 88. The writ is of the same nature and efficacy as the writ of right to recover the fee. 2 Black. Com. 182. It issued upon filing a *præcipe*, wherein the widow stated that she had been married to and declared herself to have been the

Its form is as follows:

(Original.) WRIT OF DOWER.

George the Fourth, etc., to the Sheriff of —, Greeting:

Command C. D. that justly and without delay he render to A. B., widow, who was the wife of E. B., now deceased, the reasonable dower which falleth to her of the freehold which was of the said E. B., her late husband, in the parish of —, whereof she hath nothing as she says, and whereof she complains that the said C. D. deforces her. And unless he shall so do, and if the said A. B. shall give you security of prosecuting her claim, then summon, by good summoners, the said C. D., that he be before our justices of the bench at Westminster, in eight days of Saint Hilary, to show wherefore he hath not done it, and have you there the summoners and this writ.

Witness ourself, at Westminster, the — day of —, in the — year of our reign. (y)

§ 42. The writ of *quare impedit* is the remedy by which, where the right of a party to a benefice is obstructed, he recovers the presentation, and is the form of action now constantly adopted to try a disputed title to an advowson. (z)

Its form is as follows:

(Original.) WRIT OF QUARE IMPEDIT.

George the Fourth, etc., to the Sheriff of —, Greeting:

Command T., bishop of —, and C. D., Esquire, and E. F., clerk, that justly and without delay they permit A. B., widow,

(y) 3 Chitty, 598; Booth, 166

(z) Booth, 228; 1 Arch. 434.

wife of the person whom she claimed was her late husband; the writ would be abated if this were omitted. Fulliam v. Harris, Cro. Jac. 217; 3 Chitty, Pl. 1811. Until dower had been assigned, or if judgment had been obtained upon the writ and possession taken by the demandant, the owner of the fee or remainder-man might enter and take possession to protect his title. The writ of dower is now abolished in most of the states, but ejectment may be resorted to to accomplish the same purpose." Newell on Ejectment, p. 28. See, also, King v. Merritt, 67 Mich. 194; Evans v. Evans, 29 Pa. St. 277. And if the plaintiff prevails she recovers,

in addition to her dower, *damages* for its detention. This right, unknown to the common law, was given by the statute of Merton (20 Hen. III, ch. 1) in cases where the husband died seized. The states in this country in which statutory provision is made for this additional remedy are: Illinois, Iowa, Maine, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Rhode Island, Virginia, West Virginia and Wisconsin. See a note to the case of Roan v. Holmes, 21 L. R. A. 189. See, also, 1 Washb. Real Prop. (5th ed.), pp. 291-298.

to present a fit person to the church of —, which is vacant, and belongs to her presentation as she saith, and whereof she complaineth that the said bishop and C. D. and E. F. unjustly hinder her. And unless they shall so do, and if the said A. B. shall give you security of prosecuting her suit, then summon, by good summoners, the said bishop and C. D. and E. F., that they be before our justices at Westminster, in eight days of Saint Hilary, to show wherefore they will not do it; and have you there the names of the summoners and this writ.

Witness ourself, at Westminster, the — day of —, in the — year of our reign. (a)

[§ 43. **Modern mixed actions.**—A treatise of this kind would be incomplete without pointing out the usual modern remedies, recognized by our laws for the protection of rights, and the editor takes this place to give a brief summary of the mixed actions not mentioned or sufficiently explained by our author. The actions which require notice are forcible entry and detainer, waste, trespass to try title, and writ of entry.

§ 44. **Forcible entry and detainer** is another remedy for the recovery of the possession of land, but its origin and basis are somewhat peculiar. It was intended to prevent violence and a resort to force, and consequently for every entry upon land in actual possession with actual force it was a remedy to put the parties *in statu quo* without regard to the legal right either may have had in the land. It was regulated by statute in England at an early day, and most of the states have preserved the remedy.

It is a vexed question, and one upon which there is conflict of authority, whether an action of trespass *quare clausum* will lie at the suit of the occupant for a forcible entry upon lands by the owner. The discussion always involves the consideration of the statutes of forcible entry and detainer. It has been held that, when there was actual force, trespass would lie as well as forcible entry.¹

It is a civil action: The civil action of forcible entry and detainer is given for the purpose of protecting the possession of

(a) Booth, 225; 3 Chitty, 533; 1 Arch. 435.

¹Reedy v. Purdy, 41 Ill. 277; 439. See discussions in Ft. D. Lodge Dunston v. Cowdry, 43 Vt. 635. On v. Klein, 115 Ill. 177; Thomasson v. the contrary, see Hyatt v. Wood, 4 Wilson, 146 id. 384; Phelps v. Randolph, 147 id. 335; Stearns v. Sampson, 7 J. J. Marsh. 593, 23 Am. D. 59 Me. 568, 8 Am. Rep. 442.

real property by affording to persons entitled to the possession a cheap and convenient remedy for recovering the same.¹

What may be recovered: A section of a railroad may be recovered by a contractor.² Though there can be no adversary possession against the state, yet a person in actual possession of public lands is entitled to all the remedies which the law provides for the protection of the actual possession.³

The questions involved: Two questions are involved in these proceedings: (1) Whether the plaintiff was in exclusive possession; (2) whether the defendant forcibly invaded the possession and unlawfully detained it.⁴ The action is wholly independent of title.⁵ The party having title and right of entry must resort to ejectment.⁶ A judgment in an action of forcible entry and detainer cannot be pleaded as a bar to an action in ejectment, the questions involved being different.⁷

The possession necessary to maintain: *Pedis possessio* is not necessary to maintain this action. It is sufficient if the premises are occupied for useful purposes.⁸ The statute gives a person even in wrongful possession a right of action against the owner having a right to enter if he make a forcible entry, and no other remedy can be resorted to.⁹ The possession must be actual and of sufficiently long standing to become to a legal intent peaceable.¹⁰ This remedy is to protect actual possession, whether rightful or wrongful, against unlawful invasion, and to give summary redress and restitution.¹¹ No question of title or of the right of possession can arise.¹² Neither right of possession nor constructive possession is sufficient.¹³ Nor can the action be maintained upon a scrambling possession.¹⁴

¹ Newell on Ej. 855.

² Iron Mountain & H. R. R. v. Johnson, 119 U. S. 608.

³ Mears v. Dexter, 14 Va. L. J. 240.

⁴ Jamison v. Graham, 57 Ill. 94.

⁵ Smith v. Hollenback, 51 Ill. 223; Stillman v. Palis, 134 id. 532.

⁶ Shoudy v. School Directors, 32 Ill. 290.

⁷ Riverside Co. v. Townshend, 120 Ill. 2.

⁸ Pearson v. Herr, 53 Ill. 144; Gid-

dings v. Land & Water Co., 83 Cal. 96.

⁹ Canavan v. Gray, 64 Cal. 5, 23 Am. L. Reg. 718, and note.

¹⁰ Hoag v. Pierce, 28 Cal. 187.

¹¹ Logan v. Lee, 53 Ark. 94; Mears v. Dexter, 14 Va. L. J. 240; Iron Mountain & H. R. R. v. Johnson, 119 U. S. 608.

¹² Dils v. Justice, 10 Ky. L. Rep. 547 (1888).

¹³ Dils v. Justice, 10 Ky. L. Rep. 547.

¹⁴ Voll v. Butler, 49 Cal. 74.

In *House v. Keiser*,¹ where one in the morning entered upon a portion of a tract of land in the possession of another, and inclosed it with a fence and put a house on it before sundown, it was held that he did not acquire such a peaceable possession as to enable him to maintain the action against the possessor, who, at sundown of the same day, destroyed the house and fence and drove him away.

The force necessary: The force inhibited by the act is *actual* force, and force is an essential element to the action.² A mere trespass will not sustain the proceeding; there must be the element of force, or violence, or terror to the occupant.³ Force is the gist of the action; and entry by means of keys is not a forcible entry.⁴ But where one entered an office in the night by means of skeleton keys, and threw the furniture out and prevented plaintiff from entering, these acts were taken as one transaction and the action sustained.⁵ Where the original entry is lawful, and force is not used to prevent the plaintiff from regaining possession, the action cannot be sustained.⁶

The judgment and damages: Under Statute 8 Hen. VI., on judgment for the plaintiff the possession was restored together with treble damages.⁷ In New York, under the code, a similar rule prevails.⁸ The parties must be restored to the *statu quo*, and then the party out of possession must resort to the law to obtain what he claims.⁹

In all cases of forcible entry nominal damages may be recovered for the trespass; and, in addition, damages for injuries to the person or personal property of the plaintiff. Exemplary damages may also be awarded if the act be done in a wanton and reckless manner.¹⁰

¹ 8 Cal. 500

² *Fort Dearborn Lodge v. Klein*, 115 Ill. 177; *Hodgkins v. Jordan*, 29 Cal. 577; *Wylie v. Waddell*, 52 Mo. App. 220.

³ *Ely v. Yore*, 71 Cal. 130; *Wood v. Phillips*, 43 N. Y. 152; *Castro v. Tewksbury*, 69 Cal. 562.

⁴ *Livingston v. Webster* (Fla., 1890), 8 S. Rep. 442.

⁵ *Greeley v. Spratt*, 19 Fla. 644.

⁶ *Schmidberger v. Bloner*, 66 Hun, 527.

⁷ 8 Cooley's Black. (3d ed.) 179 et seq.

⁸ See *Stover's Anno. Code N. Y.*, §§ 1577, 1927.

⁹ *Iron Mountain & H. R. R. v. Johnson*, 119 U. S. 608.

¹⁰ *Moseller v. Deaver* (N. C.); and see note to this case in 8 L. R. A. 537.

In California, in an action for forcible entry, the plaintiff may recover damages occasioned thereby, together with a judgment for the restitution of the premises.¹

Statutory remedy for premises unlawfully detained, simply: In many states the action may be maintained under the statute by landlord, vendee, mortgagee, trustee or other person against whom the possession is withheld, by tenant, vendor, mortgagor, grantor or other person, after the expiration of his right by contract, express or implied.²

Under statutes—Demand: Where the entry is forcible, demand before suit is unnecessary.³ A distinction is to be made between such cases and one where there is an unlawful detainer after peaceable entry.⁴

§ 45. The action of waste should receive particular attention, although our author does not mention it, notwithstanding the writ of waste was not abolished in England until about ten years after the publication of his work: the reason probably is found in that the writ had fallen into disuse, and given way to the remedy by the action on the case. Waste differed from trespass in that it was most frequently brought against one in the lawful possession of the land. Besides the legal remedies for waste, equity would interfere to prevent it. The subject receives quite full treatment, with notes citing many American authorities, in Judge Cooley's edition of Blackstone.⁵

The action of waste was formerly a mixed action.⁶ The action on the case in the nature of waste was devised to avoid the defective and inadequate remedy afforded by waste. It is an equitable action, and is not to be discountenanced by any technical consideration, but must be sustained in all cases and against all persons who are by the statutes of Marlbridge or Gloucester, or by the common law, liable to waste.⁷ It may be brought against a stranger as well as against a ten-

¹ Deering's Anno. Code of Cal., § 1160 et seq.; Anderson v. Taylor, 56 Cal. 181.

² See Ragan v. Harrell, 52 Miss. 818; Stillman v. Palis, 184 Ill. 532; Labro v. Campbell, 56 N. Y. Supr. 70; Kellogg v. Groves, 53 Ia. 395; Emsley v. Bennett, 37 id. 15; McClain's Anno. Iowa Code (1888), § 4860.

³ Stillman v. Palis, 184 Ill. 532.

⁴ Farncomb v. Stern, 18 Colo. 279.

⁵ 3 Cooley's Black. (3d ed.) 223. See, also, Jerome v. Ross, 7 John. Ch. 315; Griffith v. Hillard, 64 Vt. 648.

⁶ 3 Cooley's Black. 224.

⁷ See White v. Wagner, 4 H. & J. 378.

ant.¹ By the statute of Gloucester (6 Edw. I., ch. 5), the plaintiff in an action of waste could recover not only the place wasted, but treble the damages. And this was adopted in Massachusetts.²

By statute in Maine either waste may be maintained — by which the property may be recovered, together with damages — or an action on the case in the nature of waste.³

While trespass is an injury to the possession, waste is committed or suffered by the person actually or constructively in possession.⁴ But under the code the owner of real estate, which is in the actual occupation of a tenant may maintain an action against a trespasser for an injury to his estate.⁵ Waste did not lie against a stranger; but case in the nature of waste was a different remedy, and was coextensive with the liability to injury.⁶ An action on the case in the nature of waste was a common-law remedy,⁷ and it has been adopted in some of the states. It may be brought against any one committing the wrong.⁸

Chancery has always gone greater lengths than the courts of law in staying waste. The usual remedy now is by injunction to restrain from waste, and this remedy is applicable to every species of waste.⁹

§ 46. The writ of entry was a very ancient common-law remedy for the trial of the title of land, and is quite fully described by Blackstone, who points out that it was a much more simple and speedy remedy under the Saxons than after the Conquest.

An original writ of entry was a writ requiring the sheriff to command the tenant of land that he render to the demandant the possession of the premises in question, or to appear in court on a certain day named to show cause why he has not done so.¹⁰ The writ was abolished in England by Statute 3

¹ Dupree v. Dupree, 4 N. C. R. 387; ⁶ Chase v. Hazelton, 7 N. H. 171; Bacon v. Smith, 41 Eng. C. L. 571; ⁸ Cooley's Black. (3d ed.) 227.

Dickinson v. Mayor, etc., 48 Md. 583.

² Sackett v. Sackett, 8 Pick. 807.

³ Stetson v. Day, 51 Me. 434.

⁴ Cooley on Torts (2d ed.), 392.

⁵ Brown v. Bridges, 31 Ia. 138.

⁷ 1 Washb. Real Prop. (5th ed.) 159.

⁸ Thomas v. Crofut, 14 N. Y. 474.

⁹ Hawley v. Clowes, 2 Johns. Ch. 123; Cooley on Torts (2d ed.), 395.

¹⁰ 3 Cooley's Black. (3d ed.) 180-184; Newell, Ej. 883.

and 4 William IV., chapter 27. The freehold must be in the demandant.¹ The writ of entry *sur disseisin* still survives in Maine, New Hampshire and Massachusetts.²

By statute in Maine any estate of freehold, in fee-simple, fee-tail, for life, or any term of years, may be recovered by writ of entry. And to a good declaration four things are necessary: 1. The premises demanded must be clearly described. 2. The estate which the demandant claims in the premises must be stated. 3. An allegation that the demandant was seized of the estate claimed within twenty years. 4. A disseisin of the tenant.³

Damages which a demandant may recover are the "clear annual value of the premises" during the time the tenant was in possession, and damages for waste, but not consequential damages for alleged injuries to adjoining lands belonging to the demandant; and the defendant may set off taxes and necessary expenses and the value of improvements.⁴

If the land demanded is subject to an easement the judgment will not disturb the easement.⁵ Where all the deeds under or through which a demandant claims are merely releases and quitclaim conveyances, and it does not appear that any of the grantors were ever in possession, such demandant cannot recover.⁶ But this doctrine is not applicable where the title of each side comes down from the same grantor.⁷

Possession under a claim of right constitutes a legal seisin, which will avail against everyone not having an older and better title.⁸ Equitable title is not sufficient to sustain a writ of entry.⁹ But an equitable defense will defeat the action.¹⁰ Where the claim of the tenant is merely an easement the demandant cannot recover damages.¹¹

The demandant must recover upon the strength of his own title and not upon the weakness of that of the tenant. If a tenant in common brings the writ without joining his co-

¹ Webster v. Gilman, 1 Story (U. S.), 499.

² Potter v. Baker, 19 N. H. 166.

³ Wyman v. Brown, 50 Me. 189.

⁴ McMahan v. Bowe, 114 Mass. 140.

⁵ Ayer v. Phillips, 69 Me. 50.

⁶ Rand v. Skillin, 68 Me. 108.

⁷ Wiley v. Williamson, 68 Me. 71.

⁸ Pettingell v. Boynton, 139 Mass. 244; Gibson v. Bailey, 9 N. H. 168.

⁹ Eastman v. Fletcher, 45 Me. 303.

¹⁰ Nott v. Sampson Mfg. Co., 142 Mass. 479.

¹¹ Cole v. Eastham, 124 Mass. 307.

tenants, he is entitled to recover only the undivided portion to which he proves a sufficient title.¹

A general description of the premises is sufficient.² It must, however, be made so certain that seisin may be delivered to the sheriff without reference to any description *dehors* the writ.³

In general, the action must be against the person claiming an estate not less than freehold. This is not so in case of ouster. To defeat the action on the ground that he was not tenant of the freehold, and had not ousted the demandant, the tenant must plead non-tenure in abatement.⁴ The writ is sufficient if it alleges a fee.⁵

§ 47. Trespass to try title.—Instead of the action of ejectment, some of the states have substituted *trespass to try title*. It is in form an action of trespass *quare clasum fregit*, with the additional element of a notice to the effect that the action is brought to try the title to the lands in controversy, as well as for the recovery of damages.⁶

In Texas this is the exclusive form of action for the trial of suits involving questions of controverted title.⁷ It formerly existed in South Carolina as a substitute for ejectment, but was lately abolished.⁸

Though all fictitious proceedings in the action of ejectment have been abolished, the principles of justice and equity which were administered under that form of action are nevertheless the rules of action and construction in trespass to try title.⁹

The owner of land may by a fiction elect to consider himself ousted and bring suit against an adverse claimant of the land, even though such claimant has never been in actual possession.¹⁰ The action may be maintained to recover the possession and rents from a tenant holding over after the expiration of his term.¹¹

¹ Butrick v. Tilton, 148 Mass. 98.

² Baker v. Bessey, 78 Me. 472.

³ Pettingell v. Boynton, 139 Mass. 244.

⁴ Wyman v. Brown, 50 Me. 189.

⁵ Baker v. Bessey, 78 Me. 472; Butrick v. Tilton, 141 Mass. 98.

⁶ See Kennedy v. Campbell, 2 Tr. Con. R. (S. C.) 760.

⁷ See R. S., Tex., 1879, ch. 1, tit. 96, p. 703.

⁸ See R. S., S. C., 1873, 586.

⁹ Hough v. Hammond, 36 Tex. 657.

¹⁰ Titus v. Johnson, 50 Tex. 224.

¹¹ Thurber v. Conners, 57 Tex. 96; Lamb v. Beaumont Temp. Hall Co., 2 Tex. Civ. App. 289.

When the legal title is held by the defendant for a third person, such third person is properly admitted as a party defendant to protect his interest.¹ The plaintiff must rely for recovery upon his own title and that which he has at the institution of the suit: a title subsequently acquired cannot avail him.² The action may be maintained upon an equitable as well as the legal title. The remedy was designed to be broad enough and effective enough in its scope to embrace all character of litigation affecting the title to real estate.³ It may be maintained upon a bond for title.⁴ The claimant must prove the title under which he claims, and must also prove that the land described in his petition is the same possessed by the defendant, unless he is relieved from so doing by the pleading or admission of the defendant.⁵

Defendant cannot question the validity of his grantor's title at the time of conveyance to him in a contest with a plaintiff claiming under the same grantor, unless he has a claim under a paramount title.⁶ When recovery is sought against naked trespassers without title or color of title, the defense of stale demand is unavailing to defeat the right of recovery.⁷

The defendant pleads "not guilty." This does not admit a trespass on his part, but calls upon the plaintiff not only to prove title in himself but also to prove an actual or constructive trespass by some character of adverse claim or assertion of title or interest by defendant.⁸

Where the plaintiff's interest in several tracts of land arises from one transaction they may all be sued for in one action.⁹

The verdict must explicitly locate the boundaries.¹⁰ Plaintiffs will not be permitted to recover a tract of land not described in their petition. The burden is upon them to show that the defendants were in possession of the land described in the petition.¹¹

¹ *McPherson v. Johnson*, 69 Tex. 494. *Swearingen v. Reed*, 2 Tex. Civ. App. 864.

² *Collins v. Ballow*, 72 Tex. 330; *Barnes v. McArthur*, 4 Tex. Civ. App. 71.

⁷ *Wright v. Dunn*, 73 Tex. 298.

⁸ *Titus v. Johnson*, 50 Tex. 224; *Stroud v. Springfield*, 28 id. 649.

³ *Hardy v. Beaty*, 84 Tex. 562.

⁹ *Murrell v. Wright*, 78 Tex. 519.

⁴ *Wright v. Dunn*, 73 Tex. 298.

¹⁰ *McCurdy v. Bullock*, 2 Tex. Civ. App. 223.

⁵ *Stroud v. Springfield*, 50 Tex. 224.

⁶ *Cooke v. Avery*, 147 U. S. 375;

¹¹ *Medlin v. Wilkins*, 1 Tex. Civ. App. 465.

The judgment is in form for the recovery of damages, but the successful plaintiff is entitled to a writ of *habere facias possessionem*.—ED.]

§ 48. Personal actions.—Of *personal* actions the most common are the following: *debt, covenant, detinue, trespass, trespass on the case, and replevin*.

The writ of *debt* lies where a party claims the recovery of a *debt, i. e.*, a liquidated or certain sum of money alleged to be due to him. (b)¹

Its form is as follows:

WRIT OF DEBT.

George the Fourth, etc., to the Sheriff of —, Greeting:

Command C. D., late of —, gentleman, that justly and without delay he render to A. B. the sum of — pounds of good and lawful money of Great Britain, which he owes to and unjustly detains from him, as it said. And unless he shall do so, and if the said A. B. shall make you secure of prosecuting his claim, then summon, by good summoners, the said C. D., that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, (c) to show wherefore he hath not done it; and have you there the names of the summoners and this writ.

Witness ourself, at Westminster, the — day of —, in the — year of our reign. (d)

only § 49. The writ of *covenant* lies where a party claims damages for breach of *covenant, i. e.*, of a promise under seal.²

(b) This is debt *in the debet*, which is the principal and only common form. There is another species mentioned in the books, called debt *in the detinet*, which lies for the specific recovery of goods under a contract to deliver them. 1 Chitty, 101.

(c) "Before us, wheresoever we shall then be in England," expresses, in writs, the court of king's bench; where the action in this and the following examples is supposed to be brought.

(d) Tidd's Practical Forms.

¹ Debt lies for money only. *Minick v. Williams*, 77 Va. 758. The distinguishing feature of debt, technically so called, is that it is for a sum certain, or that may be readily reduced to a certainty, and the action of debt lies for the recovery thereof without regard to the manner in which the obligation is evidenced. *Baum v. Tonkin*, 110 Pa. St. 569. Debt against an executor, in general, should be in the *detinet* only, unless he has made himself personally responsible, as by *devastavit*. *Childress v. Emory*, 8 Wheat. 642. ² Covenant will lie only where the instrument is actually signed and sealed by the party or by his authority. A recognition of the contract, though in writing and under seal, will not make it a covenant. *Gale v. Nixon*, 6 Cow. (N. Y.) 445. On a

Its form is as follows:

WRIT OF COVENANT.

George the Fourth, etc., to the Sheriff of —, Greeting:

Command C. D., late of —, gentleman, that justly and without delay he keep with A. B. the covenant made by the said C. D. with the said A. B., according to the force, form

writing under seal for the payment of an uncertain sum, covenant is the proper action. *Wilson v. Hickson*, 1 Blackf. 230. The action is not confined to any particular words but may be maintained upon any sealed instrument where the words import an agreement. *United States v. Brown*, 1 Paine (U. S.), 422. The only breach that can be assigned is of a covenant contained in the contract. *Merriman v. Bush*, 116 Pa. St. 276. It must be alleged that the instrument is under seal. *Bilderback v. Pouner*, 7 N. J. L. 64. The covenant may be set out in its own words, but this is not necessary. It is enough if a substantial breach is shown. *Fletcher v. Peck*, 6 Cranch, 87; *C. M. & St. Paul R. Co. v. Hoyt*, 37 Ill. App. 64.

THE ACTION OF ACCOUNT.—This is an appropriate place to mention the action of account, which, being obsolete in England (see *Bracken v. Kennedy*, 8 Scam. 558), our author does not mention. The action is in use in the United States, and its object is to compel an account. A jury trial is allowed in such case, usually confined to the single issue as to whether there is a liability to account, while the statement and balancing of the account are left to auditors. No evidence as to the state of the accounts is admissible before the jury. *Hawley v. Burd*, 6 Ill. App. 454. Where the action is still in use in this country its scope is considerably enlarged. At common law it could not be maintained where there were more than two

partnership interests. In Vermont the remedy is extended to an accounting between three or more partners, and even where one partnership interest is represented by an administrator. *Park v. McGowen*, 64 Vt. 173. It will not lie where a final settlement of accounts has been made, and a balance struck. *Andrews v. Allen*, 9 S. & R. 241; *Morgan v. Adams*, 37 Vt. 233. It will lie in Illinois on book accounts. *Garrity v. Hamburger Co.*, 136 Ill. 499. It may be brought by one tenant in common against a co-tenant for a proportion of rents, etc. *Barnum v. Landon*, 25 Conn. 137. And to disclose the state of the account between principal and agent. *Shriver v. Nimick*, 41 Pa. 80.

In Illinois, if the defendant fails to appear or refuses to account, appearance and accounting may be compelled by attachment of his person. *Starr & Curt. Ill. St. 188*.

The defendant may plead that he is willing to account, confessing his liability, which renders a trial unnecessary; or he may plead a full account rendered—*plene computavit*. *Lee v. Abrams*, 12 Ill. 111. Or he may deny his liability to account. *Lee v. Abrams, supra*; *Garrity v. Hamburger Co.*, 136 Ill. 499.

There is a judgment rendered of *quod computet*, which determines nothing more than a liability to account; and thereupon an account is taken by auditors. On the return of the auditors a final judgment is given for the amount found by them.

and effect of a certain indenture (e) in that behalf made between them, as it is said. And unless he shall so do, and if the said A. B. shall make you secure of prosecuting his claim, then summon, by good summoners, the said C. D., that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, to show wherefore he hath not done it; and have you there the names of the summoners, and this writ.

Witness ourself, at Westminster, the — day of —, in the — year of our reign. (f)

§ 50. The writ of *detinue* lies where a party claims the specific recovery of goods and chattels, or deeds and writings, detained from him.¹ This remedy is in somewhat less frequent use than any of the other personal actions above enumerated. The form of the writ is as follows:

(Original.) WRIT OF DETINUE.

George the Fourth, etc., to the Sheriff of —, Greeting:

Command C. D. late of —, yeoman, that justly and without delay he render to A. B. certain goods and chattels (g) of

(e) Or "a certain deed poll," or "certain articles of agreement," as the case may be.

(f) Tidd's Practical Forms.

(g) Or "deeds and writings," according to the nature of the case.

Unlike the actions sounding merely in damages, the judgment may be for more than is asked. *Gratz v. Phillips*, 5 Binn. 564; *Lee v. Abrams*, 19 Ill. 116; *Garrity v. Hamburger Co.*, *supra*. It is not the idea of the action that the defendant is indebted to the plaintiff, and the auditors are not confined to rendering an account against the former. The judgment may be the other way. *McPherson v. McPherson*, 11 N. C. 400; *Hawley v. Burd*, *supra*.

The action of account at common law lay to compel an account and settlement against a guardian in socage, bailiff, merchant (by another merchant), etc. It would lie only against the parties themselves, and not against their executors. This has been remedied in England by Stats. 4 Ann., ch. 16, and 3 & 4 Will. IV., ch. 42, 3 Cooley's Black. (8d ed.) 163.

The action has been generally supplanted by equity, whereby the production of books and an account can be compelled. *Neal v. Keel's Ex'rs*, 4 T. B. Mon. 162.

¹To maintain *detinue* or the corresponding statutory action for the recovery of chattels in specie, the plaintiff must be clothed with the legal title and the right to the possession of the goods sued for. *Boulden v. Estey Organ Co.*, 92 Ala. 182; *Graham v. Meyers*, 74 id. 432; *Robinson v. Peterson*, 40 Ill. App. 182.

In order that the plaintiff may recover it is necessary to show not only that he is entitled to the possession of the property claimed in his declaration, but also that said property is personalty. *McFadden v. Crawford*, 36 W. Va. 671. But a mere wrongdoer is not permitted to question the title of one from whose possession he

Ant. v. ...
High ...
taken ...

the value of — pounds, of lawful money of Great Britain, which he unjustly detains from him, as it is said. And unless he shall do so, and if the said A. B. shall make you secure of prosecuting his claim, then summon, by good summoners, the said C. D., that he be before us, in eight days of Saint Hilary, wheresoever we shall then be in England, to show wherefore he hath not done it; and have you there the names of the summoners and this writ.

Witness ourself, at Westminster, the — day of —, in the — year of our reign. (*h*)

§ 51. The writ of trespass lies where a party claims *damages* for a *trespass* committed against him. A trespass is an injury committed with *violence*; and this violence may be either *actual* or *implied*; and the law will imply violence though none is actually used, where the injury is of a *direct* and *immediate* kind, and committed on the *person*, or *tangible*

(*h*) Impey, C. P. 772.

took the goods. *Huddleston v. Huey*, 78 Ala. 215.

In detinue the cause of action is the detention. A detention may be included in a trespass or conversion; but there may be a detention, sufficient to support detinue, when there has been neither a trespass nor a conversion, and when neither trover nor trespass could be maintained. *Wittick v. Traun*, 27 Ala. 562; *Schulenberg v. Campbell*, 14 Mo. 491. The action was originally brought only when the taking was lawful. *Dame v. Dame*, 43 N. H. 37.

The action may be maintained though the defendant has parted with the possession of the chattel sued for. See *Caldwell v. Fenwick*, 2 Dana, 833; *Haley v. Rowan*, 5 Yerg. 301. And where the property perishes pending the suit, the plaintiff may recover the alternative value unless the defendant pleads the fact *puis darrein continuance*. *Arthur v. Ingels*, 84 W. Va. 689.

Detinue may be maintained for the detention of things severed from the freehold and converted into chattels so long as the identity of the

original material can be traced. *Cooper v. Watson*, 73 Ala. 252. See Election of Remedies. A public office is not property; its value cannot be measured. Detinue will not lie for the delivery of a commission against another officer who wrongfully refuses to issue it. *Mandamus* is the proper remedy. *Marbury v. Madison*, 1 Cranch, 137.

The judgment is in the alternative: first, that the plaintiff do recover the goods in question, specifically; or, if he cannot have the goods, that he recover the value thereof, and his damages for the detention. See *Greene v. Lewis*, 85 Ala. 221, 7 Am. St. R. 42.

The common-law action of detinue may be maintained in New Hampshire. *Dame v. Dame*, 43 N. H. 37. This form of action is still in force in Illinois; and replevin is not, in all cases, an available substitute for it. *Robinson v. Peterson*, 40 Ill. App. 182. In New York and some other states the action has been replaced by some other covering substantially the same ground. See *Harris v. Hillman*, 25 Ala. 330.

and corporeal property, of the plaintiff. Of actual violence, an assault and battery is an instance; of implied, a peaceable but wrongful entry upon the plaintiff's land.¹ The form of the writ is as follows:

(Original.) WRIT OF TRESPASS.

For an assault and battery.

George the Fourth, etc., to the Sheriff of —, Greeting:

If A. B. shall make you secure of prosecuting his claim, then put by gages and safe pledges C. D., late of —, yeoman, that he be before us on the morrow of All Souls, wheresoever

¹ Trespass is of three kinds:

(a) *To the person*, as assault, assault and battery, false imprisonment, and the like cases, when actual or implied force is always present, though it may be slight or not offensively used. It is an appropriate remedy with case for seduction in cases when there were no grounds for trespass *quare clausum*. See 1 Chitty Pl. *140-1. Also *post*, Trespass on Case; Sampson v. Smith, 15 Mass. 365.

(b) *Trespass de bonis asportatis* is brought, not to recover the identical thing taken, but damages for the illegal taking and loss of the same when the original taking is forcible and unlawful; while trover is the remedy for the unjust detention and conversion of property, although the original taking was lawful and proper. See Dame v. Dame, 48 N. H. 37.

(c) *Trespass quare clausum fregit* is the remedy for all forcible entries upon land by persons not entitled to the possession. But since the enactment of the statutes against forcible entry and detainer, it has been held by some courts that trespass will lie for a forcible entry by the owner against the will of one in possession, while other courts hold the contrary. The English decisions are not in har-

mony upon the question. That the action will lie is held in Reedy v. Purdy, 41 Ill. 279; Duster v. Cowdry, 28 Vt. 635. The contrary is held in Hyatt v. Wood, 4 John. 150, 4 Am. Dec. 258; Tribble v. Frame, 7 J. J. Marsh. 598, 23 Am. Dec. 439. See Forcible Entry and Detainer.

The gist of trespass *quare clausum fregit* is injury to the possession. Title may come in question, but it is not essential that it should. 1 Chitty Pl. 195; Lambert v. Stroother, Willes, 221; Stahl v. Grover, 80 Wis. 650. Where one is entitled to the exclusive profits, or crops growing on land, this is equivalent to a right of possession and he may maintain trespass *quare clausum*. Wilson v. Mackreth, 3 Burr. 1824; Stultz v. Dickey, 5 Binn. 285; Myers v. White, 1 Rawle, 358.

The criterion for distinguishing trespass from any other wrongful interference with person or property is not force simply but the relation of the force to the injury. If the direct result of the unlawful forcible act causes damage, trespass lies; if the damage is remote and the first act unlawful, the action is case. The question is always discussed in connection with a great English case, viz: the Squib Case. Scott v. Shepherd, 2 Wm. Black. 892; s. c. reported

we shall then be in England, to show wherefore, with force and arms, at — aforesaid, he made an assault upon the said A. B., and beat, wounded and ill-treated him, so that his life was despaired of, and other wrongs to him there did, to the

in 3 Wils. 403, 4 Smith's L. C. 796; Cotteral v. Cummins, 6 S. & R. 343; Guille v. Swan, 19 Johns. 381, 10 Anl. Dec. 234. A wrongful intent is not necessary. Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267. See Cooley on Torts (2d ed.), *439. The act must be voluntary; but, as shown by Guille v. Swan, *supra*, this is only in a limited sense. If the act done is voluntary it is not necessary that the party knew it was unlawful. Thus, if he carry away the chattels of another supposing them to be his own. Cooley on Torts (2d ed.), 488; Brown v. Kendall, 6 Cush. 292. But the intent may be material in determining whether an act which may be either lawful or unlawful is a trespass; *e. g.*, an entry in another's private room out of curiosity would be a trespass. One has an implied license to visit his neighbors or to enter stores, offices, etc. In all such cases intention may characterize the act. Cooley on Torts (2d ed.), *303. But the act must have been wrongful in the beginning or become so by an act making it a trespass *ab initio*; the mere retaining of possession, though unlawful, will not be ground for this action. Averell v. Smith, 17 Wall. 91; Polk v. Henderson, 9 Yerg. 810.

To maintain trespass to personal property the plaintiff must have possession, or the right to immediate possession, or constructive possession. Howell v. Caryll, 50 Mo. App. 440. As to real estate at common law he must have had actual possession, but possession is now held to follow ownership. Smith v. Wunderlich, 70 Ill. 426; Chandler v. Spear, 23 Vt.

333; Dean v. Comstock, 32 Ill. 173; 2 Waterman on Trespass, 358; Yahoola River Co. v. Irby, 40 Ga. 479. And the owner may maintain an action for trespass to lands unless another held the possession under him at the time the act was committed, or unless it was held in adverse possession by another. Collins v. Beatty, 148 Pa. St. 65. A lessee under a void lease may maintain the action against a wrong-doer. Graham v. Peat, 1 East, 244; Stahl v. Grover, 80 Wis. 650. At common law one in possession against the right of the owner could not maintain the action for an entry by him. See Forcible Entry and Detainer; 1 Chitty, 195; Stahl v. Grover, 80 Wis. 650.

Trespass *quare clausum fregit* was deemed an appropriate remedy for seduction. The seduction was shown in aggravation of the breaking, the declaration alleging *per quod servitium amisit*. It was early held that a count for trespass and a count stating the debauchery might be joined. Now either an action of trespass *vi et armis* must be maintained, or an action on the case founded merely on the consequences of the seduction. Blagge v. Isley, 127 Mass. 191, 34 Am. Rep. 361; White v. Murland, 71 Ill. 250; Parker v. Meek, 3 Sneed (Tenn.), 29; Ellington v. Ellington, 47 Miss. 329. See Hubbell v. Wheeler, 2 Aiken (Vt.), 359; Vanhorn v. Freeman, 6 N. J. L., 322 and note; Martinely v. Gerber, 2 M. & G. 88. In trespass *quare clausum* with an allegation of other wrongs, etc., when the real cause of action was the seduction of plaintiff's daughter, if the defendant

damage of the said A. B., and against our peace; and have you there the names of the pledges and this writ.

Witness ourself, at Westminster, the — day of —, in the — year of our reign.

(Original.) WRIT OF TRESPASS.

Quare clausum fregit.

George the Fourth, etc., to the Sheriff of —, Greeting:

If A. B. shall make you secure of prosecuting his claim, then put by gages and safe pledges C. D., late of —, yeoman, that he be before us on the morrow of All Souls, wheresoever we shall then be in England, to show wherefore, with force and arms, he broke and entered the close of the said A. B., situate and being in the parish of —, in the county of —, and with his feet, in walking, trod down, trampled upon, consumed and spoiled the grass and herbage of the said A. B. there growing, and being of great value, and other wrongs to the said A. B. there did, to the damage of the said A. B. and against our peace; and have you there the names of the pledges and this writ.

Witness ourself, at Westminster, the — day of —, in the — year of our reign.

§ 52. The writ of trespass upon the case lies where a party sues for *damages* for any wrong or cause of complaint to which *covenant* or *trespass* will not apply. (i) ¹ This action originates

(i) It is not easy to give a short and sufficiently comprehensive definition of the scope of this action. That which is here attempted is perhaps new, and is believed to be accurate. A definition somewhat similar is given in 3 Woodd. 167.

justified the unlawful entry under a license from the plaintiff, the latter might now assign the seduction as the real cause of action; and if the license was merely the implied license of law, *i. e.*, by custom, the recovery would cover the whole declaration by the doctrine of trespass *ab initio*; otherwise if the license was an express invitation. *Hubbell v. Wheeler*, 2 Aik. (Vt.) 359; *Moran v. Dawes*, 4 Cow. 412.

¹ *Griffin v. Farwell*, 20 Vt. 151. "Case," says Mr. Justice Swayne, "is a generic term which embraces many different species of action." This action originated in the manner pointed out by an author whom he

cites. But its complete establishment was resisted through several reigns. Blackstone thought that one of the most important amendments of the law during the century in which he lived was effected by extending the *equitable* writ of trespass on the case, according to its primitive institution by Edward I., to almost every instance of injustice not remedied by any other process. *Carroll v. Greene*, 92 U. S. 509; 4 Cooley's Black. (3d ed.) 442.

Comparing the court of equity with the courts of law, Blackstone remarks that the "rules of decision are in both courts equally apposite to the subjects of which they take

in the power given by the statute of Westminster 2 to the clerks of the chancery to frame new writs in *consimili casu* with writs already known. (k) Under this power they con-

(k) *Supra*, p. 68.

cognizance where the subject-matter is such as requires to be determined *secundum equum et bonum*; as generally upon actions on the case the judgments of the courts of law are guided by the most liberal equity."

on the case
This action of trespass or transgression is an universal remedy given for all personal wrongs and injuries without force, so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ. 3 Cooley's Black. (8d ed.) 122.

As to the distinguishing features of trespass on the case, see *Jordan v. Wyatt*, 4 Gratt. 151, 47 Am. Dec. 720; *Carleton v. Cate*, 56 N. H. 130; *Hunt v. Pratt*, 7 R. I. 283; *Cooper v. Chitty*, 1 Burr. 35; 1 *Sutherland on Dam.* (2d ed.) 20, 61; *Cooley on Torts* (2d ed.), *489. The element of force may or may not be present. When it exists, and the injury results directly from the force, the action is trespass, but when the injury is remote the action is case. The original act may even be lawful *per se*. So as we have seen, in treating the election of remedies, a contract may be involved, but neither the force nor the contract is the ground and basis of the action. See 3 Cooley's Black. (8d ed.) 122, note; *Cooley on Torts* (2d ed.), 75. Statutes have been passed in various states abolishing the distinction between the forms of action of trespass and trespass on the case, and in some cases including trover. In Illinois the courts have construed the statute to mean only that it allowed the plaintiff to call his writ or declaration by any name, and need not conform, or might join

the actions, but that it did not abrogate the rule that requires that the proof adduced must conform to the allegations of the declaration; and if the facts set forth should be trespass, or were a special count in case, that proof of a cause of action in case would not support an action with force and arms, and *vice versa*. *Blacklock v. Randall*, 76 Ill. 228; *Bassett v. Bratton*, 86 id. 152; *Barker v. Koozier*, 80 id. 205. But in other jurisdictions it has been held that a plaintiff might declare for a trespass with force and arms and recover without proof of the declaration by proving a cause of action, which would entitle him to a judgment had he declared in case (*Duffield v. Rosenzweig*, 144 Pa. St. 520); while in a Delaware case a statute similar to these was held to change the substantial elements of the action and allow a recovery in trespass *de bonis asportatis* when the plaintiff had no possession. *Coe v. English*, 6 Houst. (Del.) 456. And in one code state it was held that under the code abolishing all forms of action a complaint for conversion was sustained by proof which would sustain an implied *assumpsit* only. *Oates v. Kendall*, 67 N. C. 241. But as we shall see, the decisions of the courts of Pennsylvania, Delaware and North Carolina are opposed to every principle of pleading and not in harmony with the weight of authority in code or common-law states. The Illinois statute and decisions approach very closely to the code, and the decisions are in harmony with the weight of authority. See *Allegata et Probata* and *Variance*.

structed many writs for different injuries, which were considered as in *consimili casu* with, that is, to bear a certain analogy to, a *trespass*. The new writs invented for the cases supposed to bear such analogy have received, accordingly, the appellation of writs of *trespass on the case* (*brevia de transgressionem super casum*), as being founded on the particular circumstances of the case thus requiring a remedy, and to distinguish them from the old writ of *trespass*; (d) and the injuries themselves, which are the subject of such writs, are not called *trespasses*, but have the general names of *torts*, *wrongs* or *grievances*. The writs of *trespass on the case*, though invented thus, *pro re nata*, in various forms, according to the nature of the different wrongs which respectively called them forth, began, nevertheless, to be viewed as constituting, collectively, a new individual *form of action*; and this new genus took its place, by the name of *trespass on the case*, among the more ancient actions of debt, covenant, *trespass*, etc. Such being the nature of this action, it comprises, of course, many different species. There are two, however, of more frequent use than any other species of *trespass on the case*, or perhaps than any other form of action whatever. These are *assumpsit* and *trover*.

§ 53. The action of *assumpsit* lies where a party claims damages for breach of *simple contract*, *i. e.*, a *promise not under seal*. Such promises may be *express* or *implied*,¹ and the law

(d) 3 Reeves, 89, 243, 391. The first example in the books of this kind of action (*viz.*, *trespass on the case*) that has been noticed by Mr. Reeves occurs in the reign of Edward III. 22 Ass. 41.

¹ Rudder v. Price, 1 H. Black. 551. *Assumpsit*, while having been devised by the chancery clerks under their power to frame new writs, and consequently being in its origin an action on the case, yet has so different a nature and foundation from the other actions that it is now commonly classed as a distinct action of a distinct nature, *i. e.*, it is classed as *ex contractu*, while all other actions on the case are classed *ex delicto*. 1 Chitty Pl. *107 et seq.; Carter v. White, 32 Ill. 509. The sealing or non-sealing of the contract has a de-

termining influence as to whether this form of action shall be brought, or whether covenant or debt is the proper action. Brown v. Perry, 14 Ind. 82. The declaration must allege a promise; but the word "promise" need not be used; any equivalent word or facts is sufficient. Avery v. Tyringham, 3 Mass. 160; Allen v. Patterson, 8 Seld. (N. Y.) 476; Davis v. McCready, 17 N. Y. 280. See *post*, Allegations, p. 108.

The basis of the action belongs to the subject of contract, and is always a contract express or implied.

always *implies* a promise to do that which a party is legally liable to perform. This remedy is consequently of very large and extensive application.

The forms of action are only to be noticed here, and are shown in the outline. They are of two classes: General *assumpsit*, so called simply because there are general forms devised for stating the various causes of action most commonly arising, and hence these forms are called the common counts. These common counts were again classified, because of some special point of difference. While all are for the recovery of money, the distinguishing feature is the manner in which the indebtedness is alleged to have arisen and the promise made. In *indebitatus assumpsit* the defendant is alleged to be indebted for money, on account of any of the various things enumerated in the outline, and in consideration of such indebtedness promised, etc. *Indebitatus assumpsit* will not lie when a special contract exists and is not fully performed. *Cutter v. Powell*, 6 T. R. 820, 2 Smith's L. C. 1, notes; *Dermot v. Jones*, 28 How. 321; *Puterbaugh*, Ill. Pl. & Pr. (5th ed.) 69. But it will lie to recover the stipulated price due on a contract fully performed. *Id.*; *Combs v. Steele*, 80 Ill. 101.

The *quantum meruit* count being generally for service when the price is either not fixed or the contract fixing it is not the basis of the suit, the plaintiff alleges that he performed services only, in consideration thereof the plaintiff promised, etc. 1 Chitty, Pl. *352.

The *quantum valebant* is for the value of goods when the plaintiff is not bound by any fixed price and alleges a sale, which, as we have seen, may have arisen by waiving a tort, and alleges that in consideration

thereof the defendant promised to pay, etc. 1 Chitty, Pl. *352.

Under the *indebitatus* count the plaintiff may recover for any of the things mentioned that he might under the *quantum meruit* or *quantum valebant* count, and these counts are no longer necessary. 1 Chitty, Pl. *352. The count for an account stated recites that the defendant, being found indebted upon an account, in consideration thereof promised, etc. 1 Chitty, Pl. *352.

The names, however, do not express the real difference between general and special *assumpsit*. The difference in substance is this: That in general *assumpsit* the cause of action is *never* based upon an express contract, no matter whether there was an express contract or not. The recovery is based upon the implied contract to pay. The contract will prevent the plaintiff from recovering beyond the contract price, but cannot be used by him to prevent the defendant from proving mitigating facts under this count. *Cutter v. Powell*, 1 Smith's L. C. (9th ed.) 46; *Everett v. Gray*, 1 Mass. 101. Special *assumpsit* is always based upon an express contract. *Cutter v. Powell*, 1 Smith's L. C. (8th ed.) 46, note.

Special *assumpsit* is the *only* appropriate remedy to recover what is due upon or for the breach of an express simple contract when the plaintiff grounds his cause of action upon the contract. This form of count differs from general *assumpsit* in this point: that special *assumpsit* lies only upon an express contract while general *assumpsit* never does. There is some confusion in the books, and recent writers who copy them seem

§ 54. The action of trover is that usually adopted (by preference to that of *detinue*) to try a disputed question of property in goods and chattels. In form it claims *damages*, and is founded on a suggestion in the writ (which in general is a mere fiction) that the defendant *found* the goods in question, being the property of the plaintiff; and proceeds to allege that he *converted* them to his own use.¹

to have followed the error; but the learned editors of Smith's Leading Cases have stated the matter so clearly, together with the authority, that there is but little left but to give them the proper credit. They say: "The confusion and obscurity which exists in the books in relation to this matter of special and general *assumpsit* have arisen from an erroneous impression that when there has been a special contract, and the plaintiff brings general *assumpsit*, the special contract of the defendant is in some degree or to some extent the ground of the plaintiff's recovery. This impression arises from an error as to the legal nature of and ground of general *assumpsit*, which rests only on a legal liability springing out of a consideration received." Cutter v. Powell, 2 Smith's L. C. (8th ed.) 48, notes; 2 Sutherland on Dam. 508-9; Kernstetter v. Raymond, 10 Ind. 199. As a matter of course there are no common counts for special *assumpsit*, and, as was said in the introduction, there are no common counts except those in general *assumpsit*.

The code has been called a fact system, and it has been supposed that as such it would allow no common counts or general issues; and while this would seem to be the correct view, still these forms are so concise and easily understood that they are now, together with all their distinctions and fictions, very generally in use in the code states. Allen v.

Patterson, 7 N. Y. 476, 57 Am. Dec. 542, note. The question as to their appropriate use will again arise under Joinder of Counts.

¹Trover was based upon the unlawful conversion of the plaintiff's property. The original taking may have been lawful or unlawful, peaceable or with force, but the gist of the action was converting the property. This might be by actually disposing of it, or refusing to deliver it upon request, and was deemed *prima facie* evidence of conversion. Draper v. Faulks, Yel. Metcalf's Notes, 166. Where defendant acquired possession rightfully, demand and refusal must be shown. Carleton v. Lovejoy, 54 Me. 445. Demand is not necessary when at the time of taking the plaintiff forbade the taking. Waller v. Bowling, 108 N. C. 289. The action will not lie for goods in the custody of the law under legal process. Jenner v. Joliffe, 9 Johns. 381. It has been maintained for books of record and seal of a corporation, etc. Dartmouth College v. Woodward, 4 Wheat. 518. Exclusive possession of personal property by one tenant in common, and a denial of right of co-tenants, is a conversion. Waller v. Bowling, 108 N. C. 289.

Trover is based upon a strict legal right as distinguished from an equitable one. Tregoning v. Allenborough, 7 Bing. 97; Ramsdell v. Morgan, 16 Wend. 574; Debow v. Colfax, 10 N. J. L. 128. But, as against a stranger to the title, possession is suf-

wrongfully
to plaintiff

6:1:10

Specimens will here be given of the original writ in *assumpsit*, in *trover*, and in another species of frequent occurrence, namely, an action on the case for libel.¹

ficient evidence of property. *Pinkham v. Gear*, 3 N. H. 484. It must appear that the conversion was before the commencement of the suit. *Glenn v. Garrison*, 17 N. J. L. 1. The motive of the defendant cuts no figure. If the act of conversion or the refusal, which is held evidence of it, is unlawful, the fact that the defendant honestly believed in his own right is immaterial except as to damages. *Carlton v. Lovejoy*, 54 Me. 445; *Hill v. Snell*, 104 Mass. 177; *Campau v. Bemis*, 85 Ill. App. 37; *Ramsdell v. Morgan*, 16 Wend. 574. A purchaser in good faith from one who has no title will be guilty of trover for actually converting the goods or refusing to deliver; but a purchaser in good faith from one who has a fraudulent title (though voidable) is not guilty of conversion by a sale, but gets a valid title. *Ramsdell v. Morgan*, 16 Wend. 574; *Fawcett v. Osborn*, 82 Ill. 411; *Montague v. Ficklin*, 18 Ill. 99.

The word "conversion" is a necessary word in the description of the cause of action, and is a technical word, *ex vi termini* importing a wrong, and hence there can be no plea in confession and avoidance to the declaration. *Young v. Cooper*, 6 Exch. 259, *Ames' Cases*, 63; *Hurst v. Cook*, 19 Wend. 463; *Stephenson v. Little*, 10 Mich. 483. The English rules, H. T. 4 Will. 4, have changed the scope of the general issue in such cases and allowed special plea of justification, and the example has been followed by statutes and codes in America; but in such case the defendant justifies the acts alleged and avers them to be the supposed conversion, etc. Most of the works upon

pleading since the rules above referred to do not keep the old distinction in view, and are apt to mislead. A very instructive case closely following these rules is *Stancliff v. Hardwick*, 2 Crompton, M. & R. 1.

The damages are not confined to the value of the goods, but may include exemplary damages for outrageous acts accompanying the tort. *Forsythe v. Wells*, 41 Pa. 291; *Dartmouth College v. Woodward*, 4 Wheat. 518.

The actual owner, though not in possession, or one having special interest with possession, may maintain the action. *Mather v. Trinity Church*, 3 S. & R. 509. It is held that a co-tenant, by exercising exclusive dominion over property against the demand of another tenant in common, may be guilty of conversion. *Waller v. Bowling*, 108 N. C. 289. But the general rule is that one tenant in common cannot be guilty of conversion except by destroying the property or selling it for his own use. *Stancliff v. Hardwick*, 2 C., M. & R. 1; *Alderson v. Schultz*, 64 Wis. 46.

Whenever trespass will lie for taking goods of the plaintiff wrongfully, trover will also lie. 1 Chitt. Pl. 153; *Drew v. Spaulding*, 45 N. H. 472. It will lie for cutting and carrying away corn standing and growing (*Nelson v. Burt*, 15 Mass. 204); or for cutting and carrying away trees. *Whidden v. Seelye*, 40 Me. 247. But it does not lie in such cases unless there is also an asportation. *Mather v. Trinity Church*, 3 S. & R. 509.

¹ Strangely our author notices but slightly and gives but a single instance of that great class of actions, embracing so many instances, so fa-

(Original.) WRIT OF TRESPASS ON THE CASE.

In Assumpsit.

For goods sold and delivered.

George the Fourth, etc., to the Sheriff of —, Greeting:

If A. B. shall make you secure of prosecuting his claim, then put by gages and safe pledges C. D., late of —, gentleman, that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England, to show for that whereas the said C. D. heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, was indebted to the said A. B. in the sum of — pounds, of lawful money of Great Britain, for divers goods, wares and merchandises by the said A. B. before that time sold and delivered to the said C. D., at his special instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said sum of money when he, the said C. D., should be thereto afterwards requested; yet the said C. D., not regarding his said promise and undertaking, but contriving and fraudulently intending, craftily and subtilly, to deceive and defraud the said A. B. in this behalf, hath not yet paid the sum of money, or any part thereof, to the said A. B. (although oftentimes afterwards requested). But the said C. D. to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said A. B. of — pounds, as it is said; and have you there the names of the pledges and this writ.

Witness ourself, at Westminster, the — day of —, in the — year of our reign.

miliar under the denomination of actions on the case, other than *assumpsit* and *trover*. It is the most usual remedy for all injuries arising by reason of negligence, non-feasance or intentional wrongs, with or without force, where the force is not the ground of the suit, and the damages are too consequential and remote to sustain trespass. See *Trespass*; *Chambers v. Baldwin* (Ky.), 11 L. R. A. 545; also *Thomas v. Winchester*, 6 N. Y.

397, 57 Am. Dec. 455; *Fletcher v. Ryland*, L. R. 3 H. L. Cas. 330; *Garland v. Town*, 55 N. H. 55, 20 Am. Rep. 164. The student will find in Hughes' *Technology of Law* a collection of most of the great cases illustrating the various phases of this subject and showing its vast scope and importance. The liability for torts does not depend upon the intent or capacity of the actor. *Sikes v. Johnson*, 16 Mass. 389.

(Original.) WRIT OF TRESPASS ON THE CASE.

In Trover.

George the Fourth, etc., to the Sheriff of —, Greeting:

If A. B. shall make you secure of prosecuting his claim, then put by gages and safe pledges C. D., late of —, gentleman, that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England, to show for that whereas the said A. B., heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, was lawfully possessed, as of his own property, of certain goods and chattels, to wit, twenty tables and twenty chairs of great value, to wit, of the value of — pounds of lawful money of Great Britain; and being so possessed thereof, he, the said A. B., afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, casually lost the said goods and chattels out of his possession; and the same afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, came to the possession of the said C. D. by finding; yet the said C. D., well knowing the said goods and chattels to be the property of the said A. B., and of right to belong and appertain to him, but contriving and fraudulently intending, craftily and subtilly to deceive and defraud the said A. B. in this behalf, hath not as yet delivered the said goods and chattels, or any part thereof, to the said A. B. (although often requested so to do); but so to do hath hitherto wholly refused, and still refuses; and afterwards, to wit, on the — day of — in the year —, at — aforesaid, in the county aforesaid, converted and disposed of the said goods and chattels to his, the said C. D.'s, own use, to the damage of the said A. B. of — pounds, as it is said; and have you there the names of the pledges, and this writ.

Witness ourself at Westminster, the — day of —, in the — year of our reign.

(Original.) WRIT OF TRESPASS ON THE CASE.

For a libel.

George the Fourth, etc., to the Sheriff of —, Greeting:

If A. B. shall make you secure of prosecuting his claim, then put by gages and safe pledges C. D., late of —, gentleman, that he be before us in eight days of Saint Hilary, wheresoever we shall then be in England, to show for that whereas the said A. B. now is a good, true and honest subject of this realm, and as such hath always conducted himself: and, until the committing of the grievance hereinafter mentioned, was always reputed to be a person of good fame and credit, and

hath never been guilty, nor, until the committing of the said grievance, been suspected to have been guilty, of perjury, or any other such crime; by means of which said premises, he, the said A. B., before the committing of the said grievance, had deservedly obtained the good opinion of all his neighbours, and of all other persons to whom he was known, to wit, at —, in the county of —. And whereas, before the committing of the said grievance, a certain action had been depending in our court before us at Westminster, in the county of Middlesex, wherein one E. F. was the plaintiff, and one G. H. was the defendant, which said action had been then lately tried at the assizes in and for the county of —; and on such trial, the said A. B. had been examined on oath, and had given his evidence as a witness on the part of the said E. F., to wit, at — aforesaid, in the county last aforesaid; yet the said C. D., well knowing the premises, but greatly envying the happy condition of the said A. B., and contriving, and wickedly and maliciously intending to injure the said A. B. in his good fame and credit, and to bring him into public scandal, infamy and disgrace, and to cause it to be suspected and believed that he, the said A. B., had been guilty of perjury, heretofore, to wit, on the — day of —, in the year of our Lord —, at — aforesaid, in the county last aforesaid, falsely, wickedly and maliciously did compose and publish, and cause and procure to be published, of and concerning the said action, and the evidence so given by the said A. B., a certain false, scandalous, malicious and defamatory libel, containing, among other things, the false, scandalous, defamatory and libelous matter following, of and concerning the said A. B., and of and concerning the said action, and the evidence so given by the said A. B., that is to say: He (meaning the said A. B.) was forsworn on the trial (meaning the said trial, and thereby then and there meaning that he, the said A. B., in giving his evidence as aforesaid, had committed wilful and corrupt perjury). By means of the committing of which grievance, he, the said A. B., hath been and is greatly injured in his said good fame and credit, and brought into public scandal, infamy and disgrace, insomuch that divers good and worthy subjects of this realm have, by reason of the committing of the said grievance, suspected and believed, and still do suspect and believe, the said A. B. to have been guilty of perjury; and have, by reason of the committing of the said grievance, from thenceforth hitherto refused to have any transaction or acquaintance with the said A. B., as they otherwise would have had, to the damage of the said A. B. of — pounds, as it is said; and have you there the names of the pledges, and this writ.

Witness ourself, at Westminster, the — day of —, in the — year of our reign.

§ 55. **Replevin.**—In the action of *replevin* (which is the last of those above enumerated) there is *no* original writ, (m)¹—this action not being *commenced* in the superior courts. It is, however, *entertained* there, by virtue of an authority which the superior courts exercise of *removing* suits, in certain cases, from an inferior jurisdiction, and transferring them to their own cognizance. Where goods have been *distreined*, a party making plaint to the sheriff may have them *replevied*, that is redelivered to him, upon giving security to prosecute an action against the distreiner, for the purpose of trying the legality of the distress; and if the right be determined in favour of the latter, to return the goods. The action so prosecuted is called an action of *replevin*, and is commenced in the county court. From thence it is removed into one of the superior courts by a writ either of *recordari facias loquelam* or *accedas ad curiam*. (n) In form it is an action for *damages* for the illegal taking and detaining of the goods and chattels. It is held that a replevin may be had and an action of replevin brought upon other kinds of illegal taking besides that by way of a distress; (o) but in no other case is the proceeding now known in practice.²

(m) The action of replevin here mentioned is that by *plaint*, which is the only kind known in practice. There was anciently in use another species of replevin, in which a writ issued out of the court of chancery, directed to the sheriff. This writ, however, was not returnable into a superior court, nor the foundation of any action therein, but merely required the sheriff to cause the goods to be replevied. 2 Selwyn, 1053; 2 Inst. 139; Register of Writs.

(n) These writs vary slightly in their form. The former is in use when the replevin was commenced in the county court; the latter, when commenced in the court of a lord. 2 Selwyn, 1063.

(o) 2 Selwyn, 1053; 1 Chitty, 159.

¹ Moor v. Watts, Ld. Raym. 617.

² This action is regulated by statute in almost all the states. Though it was originally devised to recover goods wrongfully taken by way of distress, the action lies generally for any wrongful taking or wrongful withholding of any sort of chattels, animate or inanimate. Burrage v. Melson, 43 Miss. 237; Eddy v. Davis, 35 Vt. 247. It is brought to recover possession, and lies only by one entitled to possession against one having actual or constructive possession.

Mitchell v. Roberts, 50 N. H. 436; Hall v. Durham, 113 Ind. 327; Odd Fellows' Hall Ass'n v. McAllister, 153 Mass. 292, 11 L. R. A. 172, and note. Possession of the officer under valid process is not constructive possession of defendant. Richardson v. Reed, 4 Gray, 492; Buck v. Colbath, 70 U. S. 334; Carroll v. Hussey, 31 N. C. 89; Lemp v. Fullerton, 83 Ia. 192, 13 L. R. A. 408, and note.

Trespass and trover seek damages; replevin, the thing itself; and the plaintiff in this action, by giving se-

§ 56. Ejectment.—The reader has now seen the form of the writs in the most usual actions, as well those real and mixed as personal; but it is proper, before proceeding farther, to explain that even those more common real and mixed actions are incomparably less frequent than the ordinary actions of the personal class, and may be said to be of rare occurrence. At a very early period, indeed, that is, soon after the reign of Ed. III., (p) the two former kinds of remedy began gradually to fall into neglect, in consequence of their being more dilatory and intricate in their forms of proceeding than personal actions, and of their being cognizable only in the court of common pleas. In lieu of them, recourse was had to certain

(p) *Vide* Hale's Hist. of Com. Law, 176.

curity, recovers possession of the property at the beginning of the action. The articles must be specified. *Snediker v. Quick*, 11 N. J. L. 179. And the party must depend on his own title, not on the weakness of his adversary's. *Stanley v. Neale*, 98 Mass. 343; *Gluck v. Cox*, 75 Ala. 310; *Holler v. Coleson*, 23 Ill. App. 324.

To make the remedy complete the plaintiff may recover damages for the injury done in the taking or withholding. The measure of the damages is the value at the time of taking, and interest thereon to date of verdict. *Hauselman v. Kegel*, 60 Mich. 540; *Washington Ice Co. v. Webster*, 62 Me. 341; *Burrage v. Nielson*, 48 Miss. 237. Consequential damages must be specially alleged. *Faget v. Brayton*, 2 H. & J. (Md.) 350; *Burrage v. Nielson*, *supra*.

Replevin in the *cepit* could be brought at common law only when the taking was wrongful and where trespass would lie. *Rich v. Baker*, 3 Denio, 79; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 1105. Replevin in the *detinet* is a statutory action and lies for wrongful detention, the manner of taking being immaterial. *Ronge v. Dawson*, 9

Wis. 246; *Cobbey on Replevin*, § 51. The defendant, by pleading *non cepit*, admits property in the plaintiff, and cannot, on that plea, have a return. *Holmes v. Wood*, 6 Mass. 1. But he may at the same time allege property in another. *Simpson v. McFarland*, 18 Pick. 427, 29 Am. Dec. 602. If the goods are obtained on the writ the declaration should allege that the defendant "detained;" if not, the allegation should be that he detains; and in the former case damages will be recovered up to the return; in the latter, for the value and damages. *Porter v. North*, 1 Wm. Saund. 347; *Wells on Replevin*, § 670; *Fox v. Prickett*, 5 Vroom (N. J.), 13; *Lindauer v. Teeter*, 41 N. J. L. 255. If *non cepit* be pleaded the plaintiff must prove that the defendant had the property. *Gray v. Parker*, 88 Mo. 160. Under *non cepit* the defendant may not show special matter in justification. *Hopkins v. Burney*, 2 Fla. 42. *Non detinet* is inappropriate when the action is in the *cepit*. *Davis v. Calvert*, 17 Ark. 85. *Non detinet* admits the wrongful taking. *Simmons v. Jenkins*, 76 Ill. 479. But under it the defendant may show title in a stranger. *Siedenbach v. Riley*, 111 N. Y. 560.

personal actions, which, though they did not *claim* the specific recovery of land (like those of the real and mixed class), were yet attended with incidents that indirectly produced that benefit. Of these, the principal, (*q*) and that which is alone retained in modern practice, was the action of *ejectment*—(*ejectio firmæ*),—a species of the personal action of *trespass*, (*r*) in which damages were claimed by a tenant for a term of years, complaining of forcible ejection or ouster from the land demised. (*s*) In favor of this mode of remedy, the courts determined that the plaintiff was entitled not *only* to recover the *damages* claimed by the action, but should also, by way of collateral and additional relief, recover possession of the land itself for the term of years of which he had been ousted. (*t*)

In consequence of the establishment of this doctrine, which gave an ejectment an effect similar to that of a real or mixed action, claimants of land were led to have recourse to it in lieu of those inconvenient remedies. Regularly, indeed, none could resort to this form of suit but those who had sustained ouster from a term of years, such being the shape of the complaint; but it was rendered much more extensive in its application by the invention of a *fictitious* system of proceeding, which enabled claimants of land, in almost every instance, upon whatever title they relied (whether term of years or freehold), to bring their cases ostensibly within the scope of this remedy. This fictitious method, being favored and protected by the courts, passed into regular practice; and the consequence is, that ejectment has long been the usual remedy for the specific recovery of real property. (*u*) There are cases, however, in which the writ of right, the writ of dower, and other real and mixed actions, are still necessary, and to which the proceeding by ejectment is held inapplicable; and it may be laid down generally, on this subject, that whenever the

(*q*) It was, however, not the only one. The action of *forcible entry*, given by the stat. 8 Hen. VI., had been applied to this purpose before the recovery of possession by ejectment came into practice. Hale, Hist. Com. Law, p. 176.

(*r*) See Appendix, note (3).

(*s*) This action is said by Mr. Adams to have been invented in the reign of Ed. II., or in the early part of that of Ed. III. Adams on Ejectment, ch. I, p. 7.

(*t*) This is said to have been determined at some time between 1455 and 1499. See Adams on Ejectment, ch. I, p. 9. Hale says it was not till the end of the reign of Ed. IV. Hist. Com. Law, p. 175.

(*u*) See the whole course of proceeding in an ejectment, perspicuously stated, 3 Bl. Com. 199.

case is such that the claimant has not in him the *right of entry*, (x) the fiction on which an ejectment rests ceases to be allowable, and recourse must consequently be had to a real or mixed action.¹

(x) See, as to this point, 3 Bl. Com. 174; Adams on Ejectment, ch. I, p. 24.

¹ Stephen classes this as a personal action by reason of the form of the writ. See note 3, App. But it is generally considered a mixed action. See 1 Chitty, *109; Walker, Am. Law, 543-559; 3 Cooley's Black. (3d ed.) 204.

By the common law ejectment will lie only for something of which the sheriff can deliver possession. The following rules are prescribed as the test: (1) The thing claimed must be a corporeal hereditament; (2) a right of entry must exist at the time of the commencement of the action; (3) the interests must be visible and tangible, so that the sheriff may deliver the possession to the plaintiff. See Newell on Ejectment, 17. Now, the statutes generally declare when the action may be used.

The declaration must contain: (1) The title of the court and the real names of the parties; (2) a description of the premises sufficiently certain to enable the sheriff to deliver possession; (3) the interest which the plaintiff claims in the premises; (4) that the plaintiff was in possession of the premises in dispute or entitled to such possession; (5) that the defendant unlawfully entered upon and dispossessed him of such premises, and that he withholds the possession; (6) sufficient allegations to show that the plaintiff is entitled to rents and profits or damages, if such are claimed; (7) the conclusion, prayer for relief, etc.

As to the description, the modern tendency is to reduce the certainty required within the more moderate limits which experience has shown

to be reasonable and convenient. *Johnson v. Neville*, 65 N.C. 677. See *Sphung v. Moore*, 120 Ind. 339; *Winslow v. Cooper*, 104 Ill. 235. Where there is a reference to other deeds for a description, such deeds must make part of the record. *Jackson v. Parkhurst*, 4 Wend. (N. Y.) 369.

In Colorado and New York, under the code, ejectment may be brought whenever it would lie at common law, and also where the writ of right was the appropriate remedy. Similar provisions are made by the statutes of Illinois—a common-law state. In New Jersey the action was always considered on the same footing with the writ of right. *Gardner v. Sharp*, 4 Wash. (U. S.) 609.

The action may be brought in some states by any plaintiff who has a right of entry against any defendant who obtains the estate. *McCann v. Rathbone*, 8 R. I. 297. In Michigan the party having the right to the present possession is always entitled to recover it. *Covert v. Morrison*, 49 Mich. 138; *Berham v. Cook*, 43 id. 573. The plaintiff must have, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the possession thereof, or of some share, interest or portion thereof, to be proved and established at the trial. How. (Mich.) Stats., § 7790. See, also, the statutory provisions in Illinois, Iowa, Indiana, Tennessee, Virginia, West Virginia and Wisconsin, and the following cases: *Barco v. Fennell*, 24 Fla. 378; *Asia v. Hiser*,

§ 57. **Return of the writ.**—The different forms of original writs and actions having been now in some measure explained, it is time to consider the course of proceeding upon the original writ.

22 id. 378; Kirk v. Hamilton, 102 U. S. 68; Fears v. Merrill, 9 Ark. 559. But against a trespasser without color of title, ejectment may be maintained on proof of prior possession. Bagley v. Kennedy, 85 Ga. 708; Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578; Dothard v. Denison, 27 Ala. 541; Wilson v. Fine, 38 Fed. Rep. 789; Smith v. Lorillard, 10 Johns. 338; McWhorter v. Heltzell, 124 Ind. 129; Am. Mortg. Co. v. Hopper, 48 Fed. Rep. 47; Mobley v. Bonner, 59 Pa. 481.

There must be an *ouster* or dispossession of plaintiff. Aiken v. Benedict, 39 Barb. 400; Reed v. Tyler, 56 Ill. 288. The disseisin of things corporeal must be by entry and actual dispossession of the freehold. *Pedis possessio* is necessary. Allen v. Holton, 87 Mass. 465. As to what is and what is not a sufficient disseisin, see Newell on Ejectment, 415 et seq. But under the statutes of some states, in the case of vacant lands, the action may be brought against one not in possession, but exercising acts of ownership, or claiming title. See Starr & Curtiss, R. S. Ill. 982. Ejectment cannot be maintained for a tract of land of part of which the plaintiffs are in possession. Kribbs v. Downing, 25 Pa. 399. A tenant in common may maintain the action against his co-tenant who has dispossessed him (Moulton v. McDermott, 80 Cal. 323; Warfield v. Lindell, 80 Mo. 273, 77 Am. Dec. 614; White-man v. Hyland, 40 N. Y. S. R. 575), and may recover the entire property from a trespasser. Smith v. Smith, 80 Cal. 624. Until the settlement of the estate an administrator may

maintain the action. Campau v. Campau, 19 Mich. 116; Miller v. Ho-berg, 23 Minn. 249; McRae v. McDonald, 57 Ala. 423; Jones v. Billstein, 28 Wis. 227; Page v. Tucker, 54 Cal. 121.

The plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's. Love v. Simms, 22 U. S. 515; Clarke v. Diggs, 28 N. C. 159, 44 Am. Dec. 73; Nelson v. Triplett, 81 Va. 286; Riggs v. Riley, 118 Ind. 208; England v. Hatch, 80 Ala. 247; Fussell v. Gregg, 118 U. S. 550.

An equitable title will not support ejectment, the legal title alone being recognized as the ground of the action. Ruffners v. Lewis, 7 Leigh, 720, 80 Am. Dec. 513; Leonard v. Diamond, 81 Md. 541; Eaton v. Smith, 19 Wis. 537; Smith v. Hunt, 13 Ohio, 260, 42 Am. Dec. 201. So under the code in Nebraska. Dale v. Hunne-man, 12 Neb. 221. This is the rule of the federal courts. Langdon v. Sherwood, 124 U. S. 74; Oaksmith v. Johnson, 92 id. 343; Smith v. McCann, 65 id. 398. Neither equitable titles, it was said in a late case in Michigan, nor equitable defenses, can avail as a basis either of recovery or of defense. McKay v. Williams, 67 Mich. 547. In Pennsylvania—there being no chancery court in that state—an equitable title will support the action. Swayze v. Burke, 37 U. S. 11. And in Missouri the statutes allow the action to be brought on incomplete titles, such as land warrants. Fenn v. Holme, 62 U. S. 21. See, also, Dodge v. Spier, 85 Ga. 585; Merrill v. Dearing, 47 Minn. 137. Under the codes any de-

Supposing it to be duly issued and executed on the defendant, it is next to be *returned*.

It will be seen on inspection of the tenor of these instruments that the sheriff is commanded to have the writ itself in court on a certain day, viz.: the day on which the defendant is directed to appear there. On that day the writ is said to be *returnable*, and it is called the *return day* of the writ. In each of the terms, except Easter, there are four stated days called *general return days*; in that term five; and on one or other of these general return days an original writ must be always made returnable. On the return day it is the duty of the sheriff to remit the writ into the superior court of common law, with his *return*; that is, a short account in writing of the manner in which he has executed it.

§ 58. *Process*.—If the defendant does not appear in obedience to the original writ, there issues, when the time for appearance is past, other writs, also returnable on some general return day in the term, called writs of *process*, enforcing the appearance of the defendant either by attachment or distress of his property, or arrest of his person, according to the nature of the case. These differ from the original writ in the following principal particulars: they issue not out of chancery, but out of the court of common law, into which the original is returnable; and accordingly are not under the great seal, but the private seal of the court; and they bear

fense that the party has may be set forth. *Hicks v. Lovell*, 64 Cal. 17, 49 Am. Rep. 679; *Shawhan v. Long*, 26 Iowa, 488, 96 Am. Dec. 164; *Wicks v. Smith*, 18 Kan. 508; *Stevens v. New York*, 84 N. Y. 805. An exhaustive treatment of the subject of the title necessary to maintain ejectment may be found in the note to *Hancock v. McAvoy*, 18 L. R. A. 781. See, also, *Newell on Eject*, 60 et seq.

The judgment must follow the complaint, and cannot be for a greater interest or larger quantity of land. *Horne v. Carter's Adm'r*, 20 Fla. 45; *Riehl v. Bingenheimer*, 28

Wis. 84; *Minke's Lessee v. McNamee*, 80 Md. 294. At common law the damages recoverable were nominal. See *Rector v. Gaines*, 19 Ark. 90. A claim for damages for withholding the freehold, and a claim for rents and profits, were distinct. *Larned v. Hudson*, 57 N. Y. 151. The latter might be recovered in an action of trespass for *mesne profits*. *Herreshoff v. Tripp*, 15 R. I. 92. But in some states they may now be recovered in the main action. See *Gardner v. Jones*, 34 Miss. 505. As to the use of the action to recover dower, see *ante*, p. 66.

teste (that is, conclude with an attesting clause) in the name of the chief justice of that court and not in the name of the king himself. It may also be observed that in common with all other writs issuing from the court of common law during the progress of the suit, they are described as *judicial* writs, by way of distinction from the *original* one obtained from the chancery. (y)

On these writs of process it is not necessary here to enlarge; (z) but there is one of them which will require some specific notice. It is that called a *capias ad respondendum*.¹ This writ directs the sheriff to enforce the appearance of the defendant by *arrest of his person*; and it lies in all the most usual personal actions. It is connected with the following important relaxation of practice relative to the original writ. The *capias*, being only process, is of course regularly issuable only after an original writ has been first sued out and returned; but to save time and expense, (a) it has become the general practice, in all cases where it lies, to *resort to it in the first instance*, and to suspend the issuing of the original writ, or even to neglect it altogether, unless its omission should afterwards be objected by the defendant. Thus the usual *practical* mode of commencing a personal action by original writ is to begin by issuing, not an original, but a *capias*. It will be convenient, however, to explain more particularly the manner in which this is done. In the king's bench the plaintiff's attorney commences the suit by preparing a draft (called a *precipe*) of the original writ, appropriate to the proposed action, in such form as is thought most proper and conformable to precedent. This he brings to the

(y) Bract. 413; 3 Cooley's Black. (3d ed.) 289.

(z) Full information on this subject will be found in 1 Tidd, 106-108, 4th ed.; 1 Sellon, 64-102.

(a) 3 Bl. Com. 261.

¹ *Capias* is very generally in use . forcible entry upon civil process in America, but is not so broad in its under the maxim, "every man's application now as formerly. Very house is his castle." Semayne's Case, generally, by constitution and statutes, imprisonment for debt is not 5 Coke, 91, 1 Smith's L. C. 238. And certain persons, i. e., certain men when acting in some capacity other than for their own private interest, are privileged. See 3 Cooley's Black. Certain places are privileged from (3d ed.) 287-8, note.

filacer (an officer of the court of common law, whose duty it is to issue the *capias* and other process on original writs), to serve as instructions for the preparation both of the original and the *capias*. To prepare or issue the *original*, indeed, is not the duty of the *filacer*, but of the *curator* (an officer of the court of chancery); but the *filacer* receives the *præcipe* for the purpose of transmitting it afterwards to the *curator*, as instructions for the latter officer to prepare an original, if it should become necessary to issue that writ; (b) and accordingly, he also receives from the plaintiff's attorney, on behalf of the *curator*, the *fine* which is payable to the king, on obtaining an original. (c) In the meantime and without waiting for the intended original, the *filacer* issues the *capias* in the form marked out by the *præcipe*; and after this, the plaintiff having no actual use for the original, it is seldom, in fact, taken out from the *curator's* office. In the common pleas the common course of proceeding is similar but with this difference: that the *præcipe* is framed, and the *capias* made out, in a form not varying (as in the king's bench) according to the form of action really intended to be brought; but always in that particular form of action called *trespass*, a fictitious method, pursued in a view to cheapness and expedition. (d) In this action of trespass no fine is payable on obtaining the original writ; and consequently the *filacer* receives none from the plaintiff upon issuing the *capias*.

Such is the usual practical mode of commencing personal actions by original writ, but it is not the invariable course, for in some cases, both in the king's bench and common pleas, the *præcipe* is taken to the *curator*, and the original writ regularly made out and issued; (e) and in all real and mixed actions, and also in personal ones, when the *capias* does not lie the same regular method must be pursued. And even when the action actually commences with a *capias*, in the manner above described, it is to be observed that the existence and issuing of an original is still, in point of law, always *supposed*; that instrument being in principle required both as authority for the institution of the suit itself and for the

(b) 1 Tidd, 98, 4th ed.; 1 Sellon, 212.

(c) Attornies' Pract., Epit. 46.

(d) 3 Bl. Com. 231; Sellon, Introd. xliii.

(e) E. g., in proceeding to outlawry. 1 Tidd, 98, 4th ed.; Attorn. Pract., Epit. 37.

issuing of the process. Accordingly, it is in the power of a defendant, in some cases, to object at a proper period of the suit that no original writ has issued; and, upon such objection, the plaintiff will be obliged, retrospectively, to supply the defect by obtaining it in proper form from the *curator's* office.¹ (f)

§ 59. Appearance and pleading — Ancient practice.— Under the *capias*, or other process, the defendant is compelled to *appear*,— either by force of *actual arrest* (where the law authorizes that proceeding), or by other methods of practice

(f) 1 Sellen, 99; Introd. xlv. See Appendix, note (4).

¹ In ordinary practice a *præcipe* is filed directing the clerk to issue summons. This should specify the court, the form of action and writ, the names of the parties, and when returnable, and in case of an error in the writ will form the basis of an amendment. *Thompson v. Turner*, 22 Ill. 389. In the United States, as we have seen, the original writ has been discarded (*Ferguson v. State*, 81 N. J. L. 289), and the first process is usually called a precept or summons. *Adams v. Vese*, 1 Gray, 58. But all writs except the final one are properly judicial or mesne process. *Ferguson v. State*, 81 N. J. L. 289; *Arnold v. Chapman*, 13 R. I. 586. To be properly denominated process it should issue from some officer and be tested and sealed. *Whitney v. Blackburn*, 17 Oreg. 564; *Dwight v. Merritt*, 18 Blatch. 305. But some notices given by court officers, such as attorneys, administrators and receivers, are treated as process. *Nichols v. Mitchell*, 70 Ill. 258. The name is immaterial; the import of the paper and the authority which issues it determine its character. *Middleton Co. v. Rock R. Co.*, 19 Fed. Rep. 252. Mere notices by parties or attorneys not bearing the court seal, though issued by statutory authority, are not generally regarded as process. *Johnston*

v. Hamburger, 18 Wis. 175; *Bailey v. Williams*, 6 Oreg. 71; *Gilmer v. Bird*, 15 Fla. 411. It is sometimes held that suit is begun by the issuance of summons. *Fleming v. Patterson*, 99 N. C. 404; *Society v. Whitcomb*, 2 N. H. 227; *Whitaker v. Turnbull*, 18 N. J. L. 172; *Caldwell v. Heitshu*, 9 W. & S. 51; *Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 341, and note; *Feazle v. Simpson*, 1 Scam. 80; *Schroeder v. Insurance Co.*, 104 Ill. 71. Other courts hold that the suit is begun by the delivery of the summons to the officer to be served. *Montague v. Stets*, 37 S. C. 200, 34 Am. St. R. 736; *Johnson v. Farwell*, 7 Greenl. 870, 22 Am. Dec. 203; *Cross v. Barber*, 16 R. I. 266; *Cox v. Cooper*, 3 Ala. 256; *Elliott v. Stevens*, 10 Iowa, 418; *Badger v. Phinney*, 15 Mass. 357. Others that the suit is not begun till service is had. *Smith v. Hurd*, 50 Minn. 503, 36 Am. St. R. 661; *Gates v. Bushnell*, 9 Conn. 530; *Kirby v. Jackson*, 42 Vt. 552; *Haynes v. Onderdonk*, 2 Hun, 619; *Porter v. Vandercook*, 11 Wis. 70; *McDaniels v. Reed*, 17 Vt. 674. But in Vermont, to prevent the barring of a claim by the statute of limitations, the taking out the writ with intention of having it served is the commencement of suit. *Day v. Lamb*, 7 Vt. 426.

which may be here passed over as belonging to the law of process. This *appearance* shall now be supposed to take place. At the same time the plaintiff also *appears* and the *pleadings* commence. The next subject for consideration, therefore, shall be the manner in which the parties *appear and plead*.

Of this subject it is impossible to obtain a clear and correct idea without some preliminary consideration of the method of appearance and pleading *anciently* in use. It will be necessary, therefore, here to give a short account of that method,

As now, so formerly, the defendant was made to appear by original writs, and process founded upon them. These, as now, were returnable in *term time*; and it may be here observed that as these writs were returnable always in *term*, so the appearance of the parties, the pleading, and all proceedings whatever in open court, took place in term time only and never in vacation.

The appearance of the parties might be either in *person* or by *attorney*; but *actual and personal* appearance *in open court*, either by the attorney or his principal, was requisite. (g)

Upon such appearance followed the allegations of fact mutually made on either side, by which the court received information of the nature of the controversy. These, described at first by the rude term of *loquela*, have been in more modern times denominated the *pleading* or *pleadings*.

As the appearance was an actual one, so the pleading was an *oral* altercation in *open court* in *presence of the judges*. (h) This method of pleading *viva voce*, universally in use among the early European judicatures, (i) and indeed the natural practice of all countries where the arts of civilization have made little progress, certainly prevailed in the English courts in the reign of Henry III., (k) and is generally supposed to have been retained there to a much later era. (l)

These oral pleadings were delivered either by the party himself or his *pleader* (called *narrator* and *advocatus*); (m) and

(g) See Appendix, note (5).

(h) See Appendix, note (6).

(i) See Appendix, note (7).

(k) *Vide* Bract. 372 b.

(l) The practice is said to have been abandoned about the middle of the reign of Edw.

III. Gilbert's Origin of King's Bench, v. 3 Reeves, 96.

(m) Bract. 413 a, 373 b.

it seems that the rule was then already established that none but a regular *advocate* (or, according to the more modern term, *barrister*) could be a pleader in a cause not his own. (n).

Formation of Issue: It was the office of the judges to superintend or (according to the allusion of a learned writer) (o) moderate the oral contention thus conducted before them. In doing this, the general aim was to compel the pleaders so to manage their alternate allegations as at length to arrive at some *specific point or matter affirmed on the one side and denied on the other*. When this matter was attained, if it proved to be a point of *law*, it fell, of course, to the decision of the judges themselves (to whom alone the adjudication of all legal questions belonged); (p) but, if a point of *fact*, the parties then, by mutual agreement, referred it to one of the various methods of trial then practiced, or to such trial as the court should think proper. This result being attained, the parties were said to be *at issue*¹ (*ad exitum*—that is, at the end of their pleading); the question so set apart for decision was

(n) See Appendix, note (8).

(o) Mr. Reeves, vol. II, 334, where some curious specimens from the Year Books are given of the manner of the *viva voce* pleading.

(p) See Appendix, note (9).

¹The formation of the issue is the end and object of all pleading; all the subsequent matters of the book have that object in view. An issue is a single certain material point. What this issue is is for the court to decide. *Avon Mfg. Co. v. Andrews*, 80 Conn. 476. The issue is framed by the parties in their pleadings, and controls the parties, the court and the jury. 1 Greenl. Ev., § 51; *Marshall v. Haney*, 9 Gill, 251; *Leopard v. Chea. & O. Ry.*, 1 Gill, 228; *Bassett v. Johnson*, 2 N. J. Eq. 154; *Eberhart v. Sanger*, 1 Wis. 72. It requires or excuses proof. *Simons v. Winters*, 5 Pet. 141. No testimony can be heard except such as bears upon the issue. *Borkenhagen v. Paschen*, 72 Wis. 272. A judgment is void collaterally if not within the issue, though based upon ample proof. *Munday v. Vail*, 84 N. J. L. 418; *Reynolds v. Stockton*, 140 U. S. 254. No judgment is *res adjudicata* which is beyond the issue. *Id.*; *Jacobson v. Miller*, 41 Mich. 90; *Duchess of Kingston's Case*, 2 Smith's L. C. 585; *Gage v. Ewing*, 107 Ill. 11. A final judgment is *res adjudicata*, though palpably against the law or the evidence, which is within the issue; it is the allegation which gives jurisdiction, and erroneous judgments may be corrected, but are binding until reversed. See Vanfleet on Collateral Attack, §§ 60, 693; 3 Cooley's Black. (3d ed.) *315. So our author points out that the object of the system is to procure an issue.

itself called *the issue*; and was designated, according to its nature, as either an issue in *fact* or an issue in *law*. (q) The whole proceeding then closed, in case of an issue in *fact*, by an award or order of the court, directing the institution, at a given time, of the mode of trial fixed upon; or, in case of an issue of *law*, by an adjournment of the parties to a given day, when the judges should be prepared to pronounce their decision.

During this oral altercation a contemporaneous official minute in writing was drawn up by one of the officers of the court, on a parchment roll, containing a transcript of all the different allegations of fact to the issue inclusive. And, in addition to this, it comprised a short notice of the nature of the action, the time of the appearance of the parties in court, and the acts of the court itself during the progress of the pleading. These chiefly consisted of what were called the "*continuances*" of the proceedings—the nature of which was as follows: There were certain purposes for which the law allowed the proceedings to be adjourned, or continued over from one term to another, or from one day to another in the same term; and when this happened, an entry of such adjournment to a given day and of its cause was made on the parchment roll; and by that entry the parties were also appointed to reappear at the given day in court. Such adjournment was called a *continuance*. Thus the award of the mode of trial on an issue in fact, and also the adjournment of the parties to a certain day to hear the decision of the court on an issue in law, were each of them *continuances*, and were entered as such on the roll. The official minute of the pleading and other proceedings thus made on the parchment roll was called *the record*. As the suit proceeded, similar entries of the remaining incidents in the cause were, from time to time, continually made upon it; and when complete it was preserved as a *perpetual, intrinsic and exclusively admissible* testimony of all the judicial transactions which it comprised. From the beginning of the reign of Rich. I. (r) commences a still extant series of records down to the present day; and such, as far back as can

(q) See Appendix, note (10).

(r) 1 Reeves, 218.

be traced, has always been the stable and authentic quality of these documents in contemplation of law. (a)¹

§ 60. Appearance — Modern practice.— To return to the modern practice. The *appearance* of the parties is no longer (as formerly) by the *actual presence in court* either of themselves or their attorneys. It is to be observed, however, that an appearance of this kind is still *supposed*; and exists in fiction or contemplation of law. But, in fact, appearance is effected on the part of the defendant (where he is not arrested) by making certain formal entries in the proper office of the court, expressing his appearance, (t) or, in case of arrest, it may be considered as effected by giving bail to the action. On the part of the plaintiff, no formality expressive of appearance is observed, but, upon appearance of the defendant, effected in the manner above described, both parties are considered as *in court*. (u)

The appearance of either party may in general purport to be either in his own person or that of his attorney; (x) but, when he appears by attorney, there ought regularly, and there is always supposed to be, a *warrant in writing* executed by him for that purpose. (y)

The appearance, in common with all subsequent proceedings supposed to take place in court, should (in accordance with the state of the ancient practice) *purport* to be in *term time*. It is to be observed, however, that though the proceeding are expressed as if occurring in the term, yet much business is now, in *fact*, done during the periods of *vacation*.²

(a) See Appendix, note (11).

(t) Impey, C. P. 216; 1 Tidd, 213, 214 (4th ed.).

(u) Impey, C. P. 215.

(x) See Appendix, note (12).

(y) 1 Tidd, 69, 70 (4th ed.).

¹ Ramsbottom v. Buckhurst, 2 M. & S. 565. So soon as the parties to a cause are brought into court it has personal jurisdiction over them, and may, with their consent, proceed at once to try the cause. The fact that the summons is made returnable at a certain term does not deprive the court of jurisdiction to try the cause at a previous term, if all parties come

in and consent to such proceeding. Hecht v. Feldman, 54 Ill. App. 144.

² Appearance may be either a special appearance for some special purpose only, as to object to jurisdiction, or to take advantage of some privilege. As the object of all process is to compel appearance, a voluntary general appearance without process waives the necessity for it, and an appearance

§ 61. Pleadings.— On appearance of the parties the *pleadings* commence. (2)¹

These have long since ceased to be delivered *orally* or in *open court*. The present practice is to draw them up, *in the first instance, on paper*, and the attorneys of the opposite parties either mutually deliver them to each other out of court, or (according to the course of practice in the particular case) file them in the office of the proper officer of the court; from whence a copy of each pleading is furnished to the party by whom it is to be answered. (a) These paper pleadings, at a subsequent period, are entered *on record* (according to a course of practice that will be afterwards stated) by transcribing them on a parchment roll.

At what exact period, and by what gradations, these alterations of the ancient system took place, has not been accurately determined. The most probable opinion seems to be

(2) See Appendix, note (18).

(a) 1 Sellon, 281, 294; 1 Arch. Prac. 110, 121, where it is explained in what cases they should be *filed*, and in what *delivered*. They are filed in the common pleas, in the office of the prothonotaries (Imp. C. P. 69, 297; 1 Sellon, 226). In the king's bench the declarations are filed with the clerk of the declarations (1 Tidd, 265, 4th ed.), and the other pleadings with the clerk of the papers (1 Sellon, 226).

waives objection to the process or service; but as consent cannot confer jurisdiction of the subject-matter, a general appearance does not have that effect. *Cooper v. Reynolds*, 10 Wall. 308; *Dennison v. Hyde*, 6 Conn. 508; *Walter v. Beckman*, 123 U. S. 320; *Van Fleet, Collateral Attack*, § 884. Appearance by a defendant in a name which, not being the name of a person, must be, to be the name of a legal entity, the name of a corporation, is an admission that such defendant is a corporation. *Legnard v. Crane Co.*, 54 Ill. App. 149.

¹ The following extract from an opinion recently delivered in one of the appellate courts of Illinois (a common-law state) very clearly sets forth the true object of all pleading, and shows the reluctance with which the courts will interfere with a verdict for reasons merely technical. The

counsel for the appellant had argued at length the question of variance between the declaration and the evidence. "The object of pleading," said Mr. Justice Schofield, "is to apprise the opposite party of the charge against him, or of the defense interposed, so that due preparation for trial may be made, and not to furnish a sword for defeating a good case on technical and fanciful distinctions, which in no manner interfere with the proper decision of the case on its merits. The most that can be said is that we have here a defective statement of a good cause of action. But the objection to the declaration can be removed by amendment before another trial, and with this suggestion we pass to the consideration of a more serious question." See *Swift & Company v. Raleigh*, 54 Ill. App. 44.

that the mode of departure from the old practice of making verbal statements in open court, and entering them contemporaneously on record, was that the pleader (through an allowed relaxation of that proceeding) began to discontinue the oral delivery, and, in lieu of it, entered his statement, in the first instance, upon the parchment roll, on which the record used to be drawn up; that the pleader of the other party had access to this roll, in order to concert his answer, which he afterwards entered in the same manner, and that the roll thus formed both the primary statement and the record; that, this method being attended with some inconveniences, the expedient was at length adopted of putting the pleadings first *on paper*, delivering them in that form to either party, or filing them in the proper office of the court, and deferring the entry of them on record till a subsequent stage of the cause. (b) It is supposed that the mode of entering, in the first instance, on the roll, continued at least as late as the reign of Edward IV. (c) When it began, that is, when the oral pleading was first abandoned, is a point of some uncertainty; but the probability seems to be that it took place in the middle of the reign of Edward III. (d)

If the method of written pleading was introduced in the manner here described, a satisfactory explanation is thus afforded of a circumstance which it would be otherwise difficult to account for, viz., *that the paper pleadings thus filed or delivered between the parties pursue the style in which the record itself was drawn up*. Like it, they are expressed in the third person, "A. B. complains," "C. D. comes and defends," etc., and state the form of action, the appearance of the parties, and sometimes the continuances and other acts and proceedings in court. (e) They are framed, in short, as if they were *extracts from the record*, though the record is, by the present practice, not drawn up till a subsequent period, and is then a transcript from *them*. Important effects belong to this peculiarity of style. Being conceived as *copies from the record*, the pleadings consequently imply previous statements by legal fiction *supposed to be still verbally made in open court*, and

(b) 3 Reeves, 427.

(c) Id.

(d) Id. 95.

(e) As to the form in which the record was drawn up, *vide supra*, p. 108.

contemporaneously recorded, according to the ancient practice. The effect of this is, that they are framed upon the same principles as those which belonged to the method of oral allegation. The parties are made to come to *issue* exactly in the same manner as when really opposed to each other in verbal altercation at the bar of the court; and all the rules which the judges of former times prescribed to the actual disputants before them are, as far as possible, still enforced with respect to these paper pleadings. (*f*)

§ 62. **Signing of pleading.**—As the oral pleading could formerly be delivered by none but regular advocates, so, at the present day, it is necessary that each paper pleading should be *signed* by a *barrister* (some few of the most ordinary and simple kind, and all declarations, excepted); and in the common pleas, no barrister can sign a pleading but one who has attained the degree of sergeant; but in the other courts there is no such restriction. On this head it may be farther observed that the pleadings, though thus signed, and sometimes in fact *drawn* by barristers, are also often *drawn* by the attorneys, or by persons of learning, who have not been admitted to the degree of barrister, but are employed by the attorneys in that department of practice exclusively,—and are known by the name of *special pleaders*.¹

After these preliminary explanations as to the general practical form of the modern pleadings, it is time to consider their individual construction.

§ 63. **The declaration or count.**—The pleading begins with the *declaration* or *count*, which is a statement, on the part of the plaintiff, of his cause of action. (*g*) In a *real* action it is most properly called *count*; in a *personal* one, the *declaration*. (*h*) The latter, however, is now the general term; being that commonly used when referring to real and personal actions without distinction. In the declaration the plaintiff states the nature and quality of his case,—in general more fully than in the writ, but still in strict conformity with the tenor of that instrument; any substantial variance

(*f*) See Appendix, note (14).

(*g*) See Appendix, note (15).

(*h*) Reg. Plac. 2, cites F. N. B. 16, a, 60, d.

¹See App., n., p. 517.

between them being a ground of objection.¹ It will be convenient here to exhibit examples of the declaration, in the form which it wears in those more frequent actions, of which the original writs have already been laid before the reader.²

¹ As we have seen, the writ has lost its former importance, but it is still necessary that the pleading conform to some definite theory or there is a departure. See *Departure*. A declaration is sufficient in law if it properly aver facts which, with the legal presumptions arising thereon, make a *prima facie* case. *People, for use, etc. v. Lane*, 86 Ill. App. 649; *Cook v. Scott*, 1 Gilm. 333. Except in particular cases there is no rule of law that any other words should be used than such as are in ordinary use, or that any sense is to be ascribed to words in pleading than the same words bear in ordinary use. *Lord Ellenborough*, 5 East, 259; 1 Chitty's Pl. (1st ed.) *235, 14th Am. ed., by Perkins, *232.

² It will be noticed that in chapter 2 of the original work the author supposed the declaration to have been filed. So rule 1 begins: "After the declaration the parties must, at each stage, demur or plead, etc." He in this place gives examples of various forms of declaration. The nature of these actions, so far as they have survived to us, or the modern actions invented to protect the rights, have been examined in connection with the original writs. In modern practice the repetitions and useless words of the old declaration are no longer necessary. The declaration in all jurisdictions should embrace a concise, clear, methodical statement of the plaintiff's cause and grounds of action; that is, the statement of the legal right and the facts constituting the injury. As we pointed out in section 8, if the plaintiff's statement does this, the narration, no matter

what its name or whenever it is filed, is good. It is in regard to how these facts are to be stated that the chief reform, so far as the strict matter of pleading is concerned (*i. e.*, allegation), is said to be found, and it is said that this change consists in a departure from the common-law rule which required that a party should plead the facts according to the legal effect and not the evidence of them. Rule VI, *post*. See, also, 1 Chitty Pl. (14th Am. ed.) *232. And the new rule is said to be that the allegation shall be of "the material facts as they actually existed or took place, and not the legal effect or aspect of those facts, and not the mere evidence or probative matter by which their existence is established. *Pomeroy*, Code Pl., § 517; 1 Bliss, Code Pl., § 151. The fictitious common count was the object aimed at by the codifier. 1st Report Code Commissioners, p. 70.

The distinction then must be made between stating the legal effect of such facts as constitute the plaintiff's right and constitute the wrong or injury, and the evidential probative facts and circumstances, and will at the same time be concise and plain. It should be noticed that the fault found with the legal facts as pleaded by the common-law rule is that they are fictitious and too concise and not circumstantial enough to give sufficient notice to the opposite party. Professor Pomeroy quotes approvingly the language of Judge Marvin in *People v. Ryder*, 12 N. Y. 438, 437: "I have supposed it safe and a compliance with the code to state the facts constituting the cause of

§ 64. The declaration.—

COUNT ON A WRIT OF RIGHT. (2)¹

In the Common Pleas.

— Term, in the — year of the reign
of King George the Fourth.— to wit, A. B. by E. F., his attorney, demands against
C. D. four messuages, four gardens and four acres of land,
with the appurtenances, in the parish of —, in the county

(1) See the Original Writ, *supra*, p. 65. N. B. In this, and all the following examples, except where notice to the contrary is given, the declaration is purposely adapted to the preceding writ; so that, upon originals in the forms above exhibited, declarations in the forms here supposed would be correct.

action substantially in the same manner in which they were stated in the old system in a special count. By that system the legal issuable facts were to be stated, and the evidence by which those facts were to be established was to be brought forward upon the trial. This position will not embrace what were known as the common counts." Professor Pomeroy says in comment: "No more accurate exposition of the fundamental doctrine announced by the codes is to be found in the books than the foregoing opinion of Mr. Justice Marvin." Pomeroy's Code Rem. (8d ed.), § 517, note.

In the same note the learned author cites several other decisions, one of which adds that in addition to the common-law rule, which was to state facts according to their legal effect instead of stating them as they actually occurred, states the change to be, that the code seems to require that they shall be stated in ordinary language. *Hill v. Barrett*, 14 B. Mon, 88. None of these, however, furnishes any criterion excepting that of discarding the common counts. In one,

which was merely in effect holding that when the action was based on an implied contract the party had a right to allege the facts from which the contract would be implied without resorting to the common counts, in the same manner as one would frame a special count in *assumpsit*, excepting that the pleader did not use the words "promised" or "agreed," or that he was indebted. As the count stood, it was clearly a good count in trespass on the case under the ancient forms. But the learned judge added that it was better in such cases to allege a promise, saying: "It is always good pleading to state the legal effect of the contract whether it be written or oral."

Thus far we have found but one criterion for determining what shall be considered pleading the facts in a case as distinguished from pleading the legal conclusions, viz., that discarding the common counts and framing a declaration which, according to common-law pleading, was a special count, is in conformity with the code, and this criterion is found

¹ It is deemed best to retain these ancient forms that the student may see for himself that which is called the verbosity and repetition of the common-law pleading. A modern

pleader would not consider that he had earned his fee if he filed so short a paper in statement of a valuable right.

of —, as his right and inheritance, by writ of the lord the king of right. And thereupon he saith that G. B., father of him, the said A. B., was seized of the tenements aforesaid, with the appurtenances in his demesne, as of fee and right in the time of peace, in the time of the Lord George the Third,

in a decision in New York rendered in 1855.

This decision of Judge Marvin seems in principle to strike the root of the matter; and it must be remembered he must have been educated and must have practiced under the common-law system. As we have seen, the common counts, under the common-law system, are always fictitious and never based upon an express contract. But this by no means warrants the conclusion that any recital of fact in any language will do, or that a change has been made in the common-law pleading in special *assumpsit* or in any other forms of action. Fifteen years later than the decision above cited the famous advocate, Charles O'Connor, said: "I think the code contains, as I best recollect at this moment, only one thing which can be called new in principle, and this is an attempt at an absolute impossibility in prescribing the rule of pleading. It declares in substance and effect that you shall not plead as in the old system the conclusions in law, or in reason from the facts of the case, and at the same time it prohibits you from stating or detailing the evidence merely on which you rely."

Twenty years subsequent to Mr. O'Connor's utterance, the late Dr. Hammond, speaking of the same matter, says: "If it was really the purpose of the authors of this change to have the statements of fact on either side couched in common colloquial language, without the use of any other terms than such as would be employed in describing the same facts

for any other purpose, and yet at the same time to have those statements perform the office of the former pleadings, they attempted an impossibility."

These are but opinions of men learned in the law, showing the trend of thought since the adoption of the code. The student and busy practitioner desire to know the actual state of the law in regard to this. The law as it now stands in the code states is not only a complete acquiescence in the doctrine of Judge Marvin, that the allegations in a special count at common law comply with the code, but the courts of the code states have with practical unanimity held that the ordinary common count which we have described, *i. e.*, general *assumpsit*, complies with the code rule in regard to the pleading of facts. *Allen v. Patterson*, 3 Seld. 542, 57 Am. Dec. 546, and note; *Pomeroy's Code Rem.*, § 54; *Terry v. Munger*, 121 N. Y. 161. Not only this, they have so far returned to the common-law doctrine as to allow a plaintiff to recover upon the common count in the case of a fully performed express contract, precisely as we pointed out under the action of *assumpsit*, without requiring him to ground his action upon the express contract. *Pomeroy's Code Rem.*, § 543 and cases. They have in such cases held further that it is not necessary to set out in terms a promise, but that it is sufficient to state facts showing the duty from which the law implies the promise. *Pomeroy's Code Rem.*, §§ 535-40. This would be good pleading in the

late king of Great Britain, to wit, within sixty years now last past, by taking the esplees thereof to the value, etc. And from the said G. B. the right descended to the said A. B., who now demands as son and heir of said G. B., his father. And that such is his right he offers, etc. (*k*)

(*k*) *Tyssen v. Clarke*, 3 Wils. 561; 3 Chitty, 640.

common-law states. *Avery v. Tyringham*, 3 Mass. 160, 3 Am. Dec. 105.

The New York court very early held that the rule of pleading in an action for a legal remedy is the same as formerly in this: that facts and not evidence of facts are to be pleaded. *Allen v. Patterson*, *supra*, citing 1 Chitty Pl. 215; *Eno v. Woodworth*, 4 Comst. 349; *Emery v. Fell*, 2 Term, 28. In some of the early cases it was doubted whether it was proper in a declaration to allege a promise in cases of implied contracts, or whether it was not necessary in such cases to set out all of the facts from which the law implied the promise. *Eno v. Woodworth*, 4 Comst. 249 (1850); *Cropsey v. Sweeney*, 27 Barb. 312 (1858). But it is now firmly established that the ordinary common counts are a sufficient statement of the facts. Notwithstanding the fact that the promise is fictitious, the allegation may be false and an express contract may exist. In *Booth v. Farmers' & Mechanics' National Bank*, Judge Mullen very concisely states the result of the attempt to find a substitute for the ancient forms of action:

"The codifiers, while professing to abolish the distinction between forms of action, found it impossible or impracticable in many cases to effect their object, and this case illustrates the failure in at least one class of cases. When case and *assumpsit* were at common law concurrent remedies, the form of action that the pleader selected was determined, as I have shown, by the insertion or omis-

sion from the declaration of the allegation that the defendant undertook and promised. This right of selecting remedies, and whether the action is in tort or *assumpsit*, must be determined by the same criterion. If this is not so, then the right of election is taken away. If taken away, which of the two is left?" 65 Barb. 457 (1873).

It is sometimes asserted that the codes will hold a count to be upon contract though no promise be alleged; but it was not in all cases necessary to expressly allege a promise in an action upon an implied contract, and even in *assumpsit* equivalent words or facts might be used. *Candler v. Rossiter*, 10 Wend. 488; *Wills v. Wills*, 34 Ind. 106; *Emery v. Fell*, 2 Term, 28; 1 Chitty Pl. (1809), 298.

All that is claimed to be left of the idea of an improvement in the manner of alleging facts is a baseless claim that an express promise must be alleged in *assumpsit* under the common-law system, but need not be under the codes; but there is no such requirement at common law, and it is held to be better pleading under the codes to allege the promise. It is necessary to a common count in *assumpsit* everywhere. The particular utility of the allegation is that it furnishes a sure criterion for determining whether the action is upon contract or *ex delicto*. *Pomeroy*, Code Rem., § 558; *Bliss*, Code Pl., § 155; *Booth v. Farmers' & Mech. Nat. Bank*, 65 Barb. 457.

It must be left to more astute

COUNT IN FORMEDON. (1)

In the Common Pleas:

— Term, in the — year of the reign
of King George the Fourth.

— to wit, A. B. demands against C. D. the manor of N., with the appurtenances which E. F. gave to G. B. and the heirs of his body issuing, and which, after the death of the said G. B., ought to descend to the said A. B., the son and heir of the said G. B., by form of the gift aforesaid, as it is said. And therefore he saith that E. F. gave the said manor, with the appurtenances, to the said G. B., and the heirs of his body issuing, in form aforesaid. By virtue of which gift the said G. B. was seised of the said manor, with the ap-

(1) See the Original Writ, *supra*, p. 66.

minds than have yet written to define that peculiar allegation which shall neither plead things according to the common-law requirement of pleading the legal effect, nor, on the other hand, consist of a statement of the evidence, and which shall also be clear, concise and methodical. We shall not again have occasion to make extended comparisons between the code and the common law, because we have now reached that part of our author's work which is the law by adoption in judicial decision in code and common-law states, and the citation may now be given by way of illustration of the application of the text without explanation. In leaving these comparisons we may well quote the language of Judge Cooley: "Nor," says that learned jurist, "are the works on common-law pleading superseded by the new codes which have been introduced in so many of the states. A careful study of these works is the very best preparation for the pleader, as well where a code is in force as where the old common-law forms are still adhered to. Any expectation which may have existed that the code was to banish technicality and substitute such simplicity that any man of common understanding

was to be competent, without legal training, to present his case in due form of law, has not been realized. After a trial of the code system for many years, its friends must confess that there is something more than form in the old system of pleading, and that the lawyer who has learned to state his case in logical manner, after the rules laid down by Stephen and Gould, is better prepared to draw a pleading under the code, which will stand the test on demurrer, than the man who, without that training, undertakes to tell his story to the court as he might tell it to a neighbor, but who, never having accustomed himself to a strict and logical presentation of the precise facts which constitute the legal cause of action or the legal defense, is in danger of stating so much or so little, or of presenting the facts so inaccurately, as to have his rights in doubt on his own showing. Let the common-law rules be mastered, and the work under the code will prove easy and simple, and it will speedily be seen that no time has been lost or labor wasted in coming to the new practice by the old road." See Preface to Black. Com. (8d ed.) xxvii.

purtenances in his demesne, as of fee and right by form of the gift aforesaid, in the time of peace, in the time of our lord the now king, by taking the esplees thereof to the value of ten pounds. And from the said G. B. the right to the said manor, with the appurtenances, descended, by form of the gift aforesaid, to the said A. B., who now demands the same as son and heir of the said G. B., his father. And which, after the death, etc., and therefore he brings his suit, etc. (*m*)

COUNT IN DOWER. (*n*)

In the Common Pleas.

— Term, in the — year of the reign
of King George the Fourth.

— to wit, A. B., widow, who was the wife of E. B., deceased, by — —, her attorney, demands against C. D. the third part of ten messuages, ten barns, ten stables, four gardens, four orchards, two thousand acres of meadow, two thousand acres of pasture, and two thousand acres of other land, with the appurtenances, in the parish of —, in the county of —, as the dower of the said A. B. of the endowment of E. B., deceased, heretofore her husband, whereof she hath nothing, etc. (*o*)

DECLARATION IN QUARE IMPEDIT. (*p*)

In the Common Pleas.

— Term, in the — year of the reign
of King George the Fourth.

— to wit, T., bishop of —, C. D., Esquire, and E. F., clerk, were summoned to answer A. B., widow, of a plea (*q*) that they permit the said A. B. to present a fit person to the rectory of the parish church of —, in the county of —, which is vacant and belongs to her presentation. And thereupon the said A. B., by — —, her attorney, complains that whereas one Sir J. D., Baronet, now deceased, in his life-time, to wit, on the — day of —, in the year —, was seized of the manor of K., with its appurtenances, to which manor the advowson of the said rectory, with its appurtenances, then belonged in his demesne as of fee. And being so seised thereof as aforesaid, he, the said Sir J. D., afterwards, to wit, on the — day of —, in the year —, at —, in the county

(*m*) Booth, 144.

(*n*) See the Original Writ, *supra*, p. 67.

(*o*) 3 Chitty, 597; Booth, 166; East. Ent. 234, b.

(*p*) See the Original Writ, *supra*, p. 67.

(*q*) "Plea," in this and many other instances, is still used in its ancient sense of *suit* or *action*. *Vide* Appendix, note (1). This, however (as will be seen hereafter), is not now its usual or ordinary meaning.

of —, presented to the said church, being then vacant, one E. G., his clerk, who, on the presentation of the said Sir J. D., was admitted, instituted, and inducted into the same, in the time of peace, in the time of our Sovereign Lord George the Third, late king of Great Britain. And he, the said Sir J. D., being so seised of the said manor, and the said advowson belonging thereto as aforesaid, afterwards, to wit, on the — day of —, in the year —, at — aforesaid, in the county aforesaid, died so seised of such estate therein, upon whose death the said manor, with the said advowson so belonging thereto, descended to the said A. B. as daughter and heiress of the said Sir J. D., whereby she became and was seised of the said manor, with the said advowson belonging thereto, in her demesne as of fee. And being so seised, the said church afterwards, to wit, on the — day of —, at — aforesaid, in the county aforesaid, became vacant by the death of the said E. G., whereby it then and there belonged, and now belongs, to the said A. B. to present a fit person to the said church so being vacant as aforesaid. But the said bishop, C. D. and E. F. will not permit her, but unjustly hinder her; wherefore she, the said A. B., saith that she is injured, and hath sustained damage to the value of — pounds. And therefore she brings her suit, etc. (r)

DECLARATION IN DEBT. (s)

On a bond.

In the King's Bench.

— Term, in the — year of the reign of King George the Fourth.

*— to wit, C. D. was summoned to answer A. B. of a plea that he render to the said A. B. the sum of — pounds, of good and lawful money of Great Britain, which he owes to and unjustly detains from him.*¹ And thereupon the said A. B., by —, his attorney, complains: For that whereas the said C. D. heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, by his certain writing obligatory, sealed with his seal, and now shown to the court here (the date whereof is the day and year aforesaid), acknowledged himself to be held and firmly bound to the said A. B. in the sum of — pounds above demanded to be paid to the said A. B.; yet the said C. D. (although often requested) hath not as yet paid the said sum of — pounds above demanded, or any part thereof, to the

(r) 3 Chitty, 586; 1 Arch. 438; 10 Went. 67.

(s) See the Original Writ, *supra*, p. 77.

¹ The words between the asterisks are used in order to conform to the writ.

said A. B. But so to do hath hitherto wholly refused, and still refuses, to the damage of the said A. B. of — pounds; and therefore he brings his suit, etc.

DECLARATION IN DEBT. (t)

On simple contract.

In the King's Bench.

— Term, in the — year of the reign of King George the Fourth.

— to wit, C. D. was summoned to answer A. B. of a plea that he render to the said A. B. the sum of — pounds, of good and lawful money of Great Britain, which he owes to and unjustly detains from him. And thereupon the said A. B., by — —, his attorney, complains: For that whereas the said C. D. heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, was indebted to the said A. B. in the sum of — pounds, of lawful money of Great Britain, for divers goods, wares and merchandise by the said A. B. before that time sold and delivered to the said C. D. at his special instance and request, to be paid by the said C. D. to the said A. B. when he, the said C. D., should be thereto afterwards requested. Whereby, and by reason of the said last-mentioned sum of money being and remaining wholly unpaid, an action hath accrued to the said A. B. to demand and have of and from the said C. D. the said sum of — pounds above demanded; yet the said C. D. (although often requested) hath not as yet paid the said sum of — pounds above demanded, or any part thereof, to the said A. B. But so to do hath hitherto wholly refused, and still refuses, to the damage of the said A. B. of — pounds; and therefore he brings his suit, etc.

DECLARATION IN COVENANT. (u)

On an indenture of lease — for not repairing.

In the King's Bench.

— Term, in the — year of the reign of King George the Fourth.

— to wit, C. D. was summoned to answer A. B. of a plea that he keep with him the covenant made by the said C. D. with the said A. B., according to the force, form and effect of a certain indenture in that behalf made between them. And thereupon the said A. B., by — —, his attorney, complains: For that whereas heretofore, to wit, on the — day of —,

(t) See the Original Writ, *supra*. That writ, it will be observed, is so general as to apply to all causes of action sufficient to constitute a *delt* in point of law. There is, accordingly, but one form of original writ in debt, though the form of the declaration will vary according to the nature of the cause of action, as in this and the preceding example.

(u) See the Original Writ, *supra*, p. 78.

in the year of our Lord —, at —, in the county of —, by a certain indenture then and there made between the said A. B. of the one part, and the said C. D. of the other part (one part of which said indenture, sealed with the seal of the said C. D., the said A. B. now brings here into court, the date whereof is the day and year aforesaid), the said A. B., for the consideration therein mentioned, did demise, lease, set, and to farm let unto the said C. D. a certain messuage or tenement, and other premises, in the said indenture particularly specified, to hold the same, with the appurtenances, to the said C. D., his executors, administrators and assigns, from the twenty-fifth day of March next ensuing the date of the said indenture, for and during, and unto the full end and term of seven years from thence next ensuing, and fully to be complete and ended, at a certain rent payable by the said C. D. to the said A. B., as in the said indenture is mentioned. And the said C. D., for himself, his executors, administrators and assigns, did thereby covenant, promise and agree, to and with the said A. B., his heirs and assigns (amongst other things), that he, the said C. D., his executors, administrators and assigns, should and would, at all times during the continuance of the said demise, at his and their own costs and charges, support, uphold, maintain and keep the said messuage or tenement and premises in good and tenantable repair, order and condition; and the same messuage or tenement and premises, and every part thereof, should and would leave in such good repair, order and condition at the end or other sooner determination of the said term; as by the said indenture, reference being thereunto had, will, among other things, fully appear. By virtue of which said indenture, the said C. D. afterwards, to wit, on the twenty-fifth day of March, in the year aforesaid, entered into the said premises, with the appurtenances, and became and was possessed thereof, and so continued until the end of the said term. And although the said A. B. hath always, from the time of the making of the said indenture, hitherto, done, performed and fulfilled all things in the said indenture contained on his part to be performed and fulfilled, yet protesting that the said C. D. hath not performed and fulfilled anything in the said indenture contained on his part and behalf to be performed and fulfilled, in fact, the said A. B. saith that the said C. D. did not, during the continuance of the said demise, support, uphold, maintain and keep the said messuage or tenement and premises in good and tenantable repair, order and condition, and leave the same in such repair, order and condition at the end of the said term; but for a long time, to wit, for the last three years of the said term, did permit all the windows of the said messuage or tenement to be, and the same during all that time were, in every part thereof ruinous, in decay and out of repair, for

want of necessary reparation and amendment. And the said C. D. left the same, being so ruinous, in decay and out of repair as aforesaid, at the end of the said term, contrary to the form and effect of the said covenant so made as aforesaid. And so the said A. B. saith that the said C. D. (although often requested) hath not kept the said covenant so by him made as aforesaid, but hath broken the same; and to keep the same with the said A. B. hath hitherto wholly refused, and still refuses, to the damage of the said A. B. of — pounds, and therefore he brings his suit, etc.¹

DECLARATION IN DETINUE. (x)

In the King's Bench.

— Term, in the — year of the reign of King George the Fourth.

— to wit, C. D. was summoned to answer A. B. of a plea that he render to the said A. B. certain goods and chattels of the value of — pounds, of lawful money of Great Britain, which he unjustly detains from him. And thereupon the said A. B., by — —, his attorney, complains: For that whereas the said A. B. heretofore, to wit, on the — day of our Lord —, at —, in the county of —, delivered to the said C. D. certain goods and chattels, to wit, forty bushels of wheat of the said A. B., of great value, to wit, the value of — pounds, of lawful money of Great Britain, to be redelivered by the said C. D. to the said A. B. when he, the said C. D., should be thereto afterwards requested. Yet the said C. D., although he was afterwards, to wit, on the — day of —, in the year aforesaid, at — aforesaid, in the county aforesaid, requested by the said A. B. so to do, hath not as yet delivered the said goods and chattels, or any part thereof, to the said A. B.; but so to do hath hitherto wholly refused, and still refuses, and still unjustly detains the same from the said A. B., to wit, at — aforesaid, in the county aforesaid, to the damage of the said A. B. of — pounds; and therefore he brings his suit, etc. (y)

DECLARATION IN TRESPASS. (z)

For an assault and battery.

In the King's Bench.

— Term, in the — year of the reign of King George the Fourth.

— to wit, C. D. was attached to answer A. B. of a plea wherefore he, the said C. D., with force and arms, at —, in

(x) See the Original Writ, *supra*, p. 79.

(y) 2 Chitty, 235.

(z) See the Original Writ, *supra*, p. 81.

¹This is a long form, but the declaration must be controlled by the contract involved in the suit.

the county of —, made an assault upon the said A. B., and beat, wounded and ill-treated him, so that his life was despaired of, and other wrongs to him there did, to the damage of the said A. B., and against the peace of our lord the now king. And thereupon the said A. B., by — —, his attorney, complains: For that the said C. D. heretofore, to wit, on the — day of —, in the year of our Lord —, with force and arms, at — aforesaid, in the county aforesaid, made an assault upon the said A. B., and then and there beat, wounded and ill-treated him, so that his life was despaired of; and other wrongs to the said A. B. then and there did; against the peace of our said lord the king, and to the damage of the said A. B. of — pounds; and therefore he brings his suit, etc.

DECLARATION IN TRESPASS. (a)

Quare clausum fregit.

In the King's Bench.

— Term, in the — year of the reign of King George the Fourth.

— to wit, C. D. was attached to answer A. B. of a plea wherefore he, the said C. D., with force and arms, broke and entered the close of the said A. B., situate and being in the parish of —, in the county of —, and with his feet, in walking, trod down, trampled upon, consumed and spoiled the grass and herbage of the said A. B. there growing, and being of great value; and other wrongs to the said A. B. there did, to the damage of the said A. B., and against the peace of our lord the now king. And thereupon the said A. B., by — —, his attorney, complains: For that the said C. D. heretofore, to wit, on the — day of —, in the year of our Lord —, with force and arms, broke and entered the close of the said A. B.; that is to say, a certain close called —, situate and being in the parish aforesaid, in the county aforesaid, and with his feet, in walking, trod down, trampled upon, consumed and spoiled the grass and herbage of the said A. B. then and there growing, and being of great value, to wit, of the value of — pounds, of lawful money of Great Britain; and other wrongs to the said A. B. then and there did; against the peace of our said lord the king, and to the damage of the said A. B. of — pounds; and therefore he brings his suit, etc.

In a former place (b) some mention was made of the action of *ejectment*; and it was stated to be a species of the action of trespass. From the great importance and frequency of this form of suit, which (as before observed) has nearly sup-

(a) See the Original Writ, *supra*, p. 93.

(b) *Supra*.

planted, in practice, the whole system of real and mixed actions, and is the almost universal remedy for the recovery of land, it will be proper now to present the reader with an example of the declaration in ejectment. The original writ, if drawn out, would of course vary in some degree, in form, from those in the two preceding species of trespass. In ejectment, however, though the proceeding is nominally by original or by bill, as in other actions, no original or writ of process is in fact ever used. The whole method of proceeding is anomalous, and depends on fictions invented and upheld by the courts for the convenience of justice. An ejectment commences by delivering to the tenant in possession of the premises a declaration framed as against a fictitious defendant (for example, Richard Roe) at the suit of a fictitious plaintiff (for example, John Doe). This declaration (when the action is brought as by original) is framed as if it had been preceded by original writ against Richard Roe; but is in fact the first step in the cause. Subscribed to this declaration is a notice, in the form of a letter, from the fictitious defendant to the tenant in possession, apprising the latter of the nature and object of the proceeding, and advising him to appear in court, in the next term, to defend his possession. Accordingly, in the next term, the tenant in possession obtains a rule of court allowing him to be made defendant, instead of Richard Roe, upon certain terms prescribed by the court for the convenient trial of the title — among others, his appearing, and receiving without writ or process, a new declaration like the first, but with his own name inserted as defendant,—and pleading thereto. The form of such new declaration is as follows:¹

DECLARATION IN EJECTMENT.

In the King's Bench.

— Term, in the — year of the reign
of King George the fourth.

— to wit, C. D. was attached to answer John Doe of a plea wherefore he, the said C. D., with force and arms, entered into five messuages, five stables, five coach-houses, five yards, and five gardens, situate and being in the parish of —, in the county of —, which A. B. (c) had demised to

(c) This is the name of the party who really institutes the suit, called the "lessor of the plaintiff," and so distinguished from the nominal plaintiff, John Doe.

¹ The ancient fictions used in this action have been long since abandoned.

the said John Doe for a term which is not yet expired, and ejected him from his said farm, and other wrongs to the said John Doe there did, to the damage of the said John Doe, and against the peace of our said lord the now king; and thereupon the said John Doe, by — —, his attorney, complains: For that whereas the said A. B. heretofore, to wit, on the — day of —, in the year of our Lord —, in the parish aforesaid, in the county aforesaid, had demised the said tenements, with the appurtenances, to the said John Doe, to have and to hold the same to the said John Doe and his assigns from the — day of —, in the year aforesaid, for and during, and unto the full end and term of — years from thence next ensuing, and fully to be complete and ended. By virtue of which said demise the said John Doe entered into the said tenements, with the appurtenances, and became and was thereof possessed for the said term so to him thereof granted as aforesaid. And the said John Doe being so thereof possessed, the said C. D. afterwards, to wit, on the — day of —, in the year aforesaid, with force and arms entered into the said tenements, with the appurtenances, in which the said John Doe was so interested, in manner and for the term aforesaid, which is not expired, and ejected him, the said John Doe, out of his said farm, and other wrongs to the said John Doe then and there did, against the peace of our said lord the king, and to the damage of the said John Doe of — pounds; and therefore he brings his suit, etc.

DECLARATION IN TRESPASS ON THE CASE. (d)

the indebtedness is only an inducement to the promise to pay
In Assumpsit.
which is a false assumption, and which is the cause of the action
For goods sold and delivered.

In the King's Bench.

— Term, in the — year of the reign of King George the Fourth.

—, to wit, C. D. was attached to answer A. B. of a plea of trespass on the case; and thereupon the said A. B., by — —, his attorney, complains: For that whereas the said C. D. heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, was indebted to the said A. B. in the sum of — pounds, of lawful money of Great Britain, for divers goods, wares and merchandises by the said A. B. before that time sold and delivered to the said C. D. at his special instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said sum of money when

(d) See the Original Writ, *supra*, p. 89.

he, the said C. D., should be thereto afterwards requested. Yet the said C. D., not regarding his said promise and undertaking, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said A. B. in this behalf, hath not yet paid the said sum of money, or any part thereof, to the said A. B. (although oftentimes afterwards requested). But the said C. D., to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said A. B. of — pounds; and therefore he brings his suit, etc.¹

DECLARATION IN TRESPASS ON THE CASE. (e)

In Trover.²

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

—, to wit, C. D. was attached to answer A. B. of a plea of trespass on the case; and thereupon the said A. B., by —, his attorney, complains: For that whereas the said A. B. heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, was lawfully possessed, as of his own property, of certain goods and chattels, to wit, twenty tables and twenty chairs of great value, to wit, of the value of — pounds, of lawful money of Great Britain; and being so possessed thereof, he, the said A. B., afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, casually lost the said goods and chattels out of his possession; and the same afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, came to the possession of the said C. D. by finding. Yet the said C. D., well knowing the said goods and chattels to be the property of the said A. B., and of right to belong and appertain to him, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said A. B. in this behalf, hath not as yet delivered the said goods and chattels, or any part thereof, to the said A. B. (although often requested so to do); but so to do hath hitherto wholly refused, and still refuses; and afterwards, to wit, on the — day of —, in the year —, at — aforesaid, in the county aforesaid, converted and disposed of the said goods and chat-

(e) See the Original Writ, *supra*, p. 90.

¹ This is one of the common counts. See *Terry v. Munger*, 121 N. Y. 161. *v. Graham*, 2 Str. 809), seventy ounces of cloves, mace and nutmegs (*Hartford v. Jones*, 1 Ld. Raym. 588),

² The description of the property need not be as certain as in detinue or replevin, for only damages are sought. Trover may be maintained for a "parcel of diamonds" (*White* Rep. 521). \$3,000 in United States treasury and bank notes of various denominations and value (*Henry v. Sowles*, 28 Fed. Rep. 521).

tels to his, the said C. D.'s, own use, to the damage of the said A. B. of — pounds; and therefore he brings his suit, etc.

DECLARATION IN TRESPASS ON THE CASE. (f)

For a libel.

In the King's Bench.

— Term, in the — year of the reign of King George the Fourth.

— to wit, C. D. was attached to answer A. B. of a plea of trespass on the case; and thereupon the said A. B., by —, his attorney, complains: For that whereas the said A. B. now is a good, true and honest subject of this realm, and as such hath always conducted himself; and, until the committing of the grievance hereinafter mentioned, was always reputed to be a person of good fame and credit, and hath never been guilty, nor, until the committing of the said grievance, been suspected to have been guilty, of perjury, or any other such crime; by means of which said premises, he, the said A. B., before the committing of the said grievance, had deservedly obtained the good opinion of all his neighbors, and of all other persons to whom he was known, to wit, at —, in the county of —. And whereas, before the committing of the said grievance, a certain action had been depending in the court of our lord, the now king, before the king himself at Westminster, in the county of Middlesex, wherein one E. F. was the plaintiff, and one G. H. was the defendant, which said action had been then lately tried at the assizes in and for the county of —; and on such trial the said A. B. had been examined on oath, and had given his evidence as a witness on the part of the said E. F., to wit, at — aforesaid, in the county last aforesaid; yet the said C. D., well knowing the premises, but greatly envying the happy condition of the said A. B., and contriving and wickedly and maliciously intending to injure the said A. B. in his said good fame and credit, and to bring him into public scandal, infamy and disgrace, and to cause it to be suspected and believed that the said A. B. had been guilty of perjury, heretofore, to wit, on the — day of —, in the year of our Lord —, at — aforesaid, in the county last aforesaid, falsely, wickedly and maliciously did compose and publish, and cause and procure to be published, of and concerning the said A. B., and of and concerning the said action, and the evidence so given by the said A. B., a certain false, scandalous, malicious and defamatory libel, containing (among other things) the false, scandalous, defamatory and libelous matter following, of and concerning the said A. B., and of and concerning the said action, and the evidence

(f) See the Original Writ, *supra*, p. 90.

so given by the said A. B., that is to say, he (meaning the said A. B.) was forsworn on the trial (meaning the said trial, and thereby then and there meaning that the said A. B., in giving his evidence as aforesaid, had committed wilful and corrupt perjury). By means of the committing of which grievance, he, the said A. B., hath been and is greatly injured in his good fame and credit, and brought into public scandal, infamy and disgrace, insomuch that divers good and worthy subjects of this realm have, by reason of the committing of the said grievance, suspected and believed, and still do suspect and believe, the said A. B. to have been guilty of perjury; and have, by reason of the committing of the said grievance, from thenceforth hitherto wholly refused to have any transaction or acquaintance with the said A. B. as they otherwise would have had, to the damage of the said A. B. of — pounds; and therefore he brings his suit, etc.¹

¹The gist of the action of slander and libel is malice. *Gilmer v. Eubank*, 18 Ill. 271; *Newell on Defamation*, pp. 322-3. Malice is always implied from the use of actionable words. *Mitchell v. Milholland*, 106 Ill. 175; 93 id. 347. And in such case, proof that there was in fact no malice can be heard only in mitigation of exemplary or punitive damages. *Rearick v. Wilcox*, 81 Ill. 80; *Gilmer v. Eubank*, *supra*.

Independently of statute, oral words spoken of a person, to be actionable *per se*, must impute the guilt of some offense by which the party if guilty might be indicted and punished by the criminal courts. *Strauss v. Meyers*, 48 Ill. 385; *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574; *Sanderson v. Caldwell*, 45 N. Y. 405; *Burtch v. Nickerson*, 17 Johns. 217, 8 Am. Dec. 391. Or they must be accompanied by special damages, or affect him in his social standing. *Colby v. Reynolds*, 6 Vt. 439, 27 Am. Dec. 574; *Joannes v. Bent*, 88 Mass. 236; *Tegg v. Dunleavy*, 80 Mo. 558, 52 Am. Rep. 512; *Newell on Defamation*, p. 84.

Words printed and published of a man may be actionable which if

only spoken of him would not sustain an action for slander. *J'Anson v. Stuart*, 1 T. R. 748, 2 Smith's Ld. Cas. 986; *Colby v. Reynolds*, 6 Vt. 489, 27 Am. Dec. 574; *Starkie on Slander*, p. 140; *Weiss v. Whittemore*, 28 Mich. 377; *Strauss v. Meyer*, 48 Ill. 385; *Cooley on Torts*, p. 205; *King v. Root*, 4 Wend. 113, 21 Am. Dec. 114; *Newell on Defamation*, p. 83. Mr. Townshend says this distinction is not recognized as to words written of one in a special character or business. *Townshend on Slander & L.*, § 180. See, also, *Id.*, p. 68, note. But to the contrary see *Weiss v. Whittemore*, *supra*.

To say of a merchant that a debt will be lost because he is unable to pay it is actionable. *Mott v. Comstock*, 7 Cow. 654. A defendant who couches his slander in ambiguous terms, in the hope of blasting the reputation of his neighbor without incurring legal responsibility, is not entitled to an indulgent construction of his words either from the court or the jury. *Gibson v. Williams*, 4 Wend. 320. Any words which in common acceptance imply a want of credit or responsibility when spoken of a merchant are actionable; *e. g.*,

With respect to *replevin*, we have already seen (g) that it is not commenced in the superior courts, and consequently that no original writ is sued out. The form of the declaration is as follows:

DECLARATION IN REPLEVIN.

In the King's Bench.

— Term in the — year of the reign
of King George the Fourth.

— to wit, C. D. was summoned to answer A. B. of a plea wherefore he took the cattle of the said A. B., and unjustly detained the same, against sureties and pledges, until, etc.;

(g) *Supra*, p. 92.

"Were there any failures yesterday? Not that I know of, but I understand that there is trouble with the Messrs. S." is actionable. *Sewell v. Catlin*, 8 Wend. 291; *Ostrom v. Calkins*, 5 Wend. 264. See, also, *Sutherland v. Bradstreet*, 46 N. Y. 188, 7 Am. Rep. 322.

Words *spoken* of a man in regard to or concerning him in his office, trade or business may be actionable, which would not be if spoken of him as an individual only. They need not impute a crime. *Burtch v. Nickerson*, 17 Johns. 217, 8 Am. Dec. 390; *Townshend on S. & L.*, §§ 179, 180, 181; *Fowler v. Bowen*, 30 N. Y. 24; *Nelson v. Borchenius*, 52 Ill. 236; *Cooley on Torts*, 196; *Weiss v. Whittemore*, 28 Mich. 360.

The parts of the declaration after the title, court and parties are: The indictment, the charge, the allegation of damages.

The inducement: This contains a statement of the facts which render the application of the charge clear and intelligible. It is usual to recite the good standing and favorable standing of the plaintiff in the eyes of the community, his purity and innocence, especially in regard to the things charged, but these are unnecessary and not traversable. New-

ell on Def. 601. But the inducement explaining the situation and relation of the parties is often useful and necessary, when the mere charge would not be clear in application and meaning. If the charge relates to one in his business, the statement that he is in such business or employment is inducement. *Id.* 603; *Carter v. Antrim*, 33 Mass. 1.

The charging part is the part which states the offense, and includes the colloquium, the statement of the defamatory words used by the defendant, and the innuendoes. In charging the words it is sufficient to set out the material words. *Spencer v. McMaster*, 16 Ill. 405. Proof of the substance of the words charged is sufficient, but not of equivalent words. *Slocum v. Kuykendall*, 1 Scam. 187; *Schmisseur v. Kreilich*, 92 Ill. 347; *Norton v. Gordon*, 16 id. 38; *Spencer v. McMaster, supra*; *Thomas v. Fischer*, 71 Ill. 576. It is not necessary to prove all the words. *Wilborn v. Odell*, 29 Ill. 456; *Crotty v. Morissey*, 40 id. 477; *Baker v. Young*, 44 id. 42. Nor is it fatal that more are proved if they do not destroy the effect of those charged. *Spencer v. McMaster, supra*; *Sanford v. Gaddis*, 15 Ill. 238; *Wilborn v. Odell, supra*.

The colloquium is an averment con-

and thereupon the said A. B., by ———, his attorney, complains: For that the said C. D. heretofore, to wit, on the ——— day of ———, in the year of our Lord ———, at ———, in the county of ———, in a certain place there called ———, took the cattle, to wit, one mare, of the said A. B., of great value,

nected with the inducement and the charge, showing that the words were spoken of and concerning the plaintiff, and if that fact is plain from the language itself, no colloquium is necessary; but the inducement should show the identity of the plaintiff and the person named in the words, so that a colloquium is never out of place. Newell on Defamation, 613.

The innuendo is an allegation explanatory of the meaning which the plaintiff charges the defendant to have intended by the words. When the words are clear it is not necessary to use an innuendo, and the meaning of the words is matter of law for the court to determine. *Lewis v. Chapman*, 16 N. Y. 371; *Elam v. Badger*, 23 Ill. 498; *Bathrick v. Detroit P. & F. Co.*, 50 Mich. 629; Newell on Defamation, 629. When the words are couched in ambiguous language it is the office of the innuendo to explain it. *Gibson v. Williams*, 4 Wend. 320. In such cases it is for the court to decide whether the language used is capable of the meaning ascribed in the innuendo. Newell on Defamation, 619. Whether such meaning was the one intended is the question for the jury. *Id.* 638. The plaintiff cannot shift his ground from the meaning alleged to another. *Id.*; *Strader v. Snyder*, 67 Ill. 404; Newell on Defamation, 629. Evidence of hearers as to how they understood the words is admissible. *Nelson v. Borchenius*, 52 Ill. 236.

The allegation of damages may be simply the usual allegation of injury or damages arising from special circumstances, which must be set forth,

and when the language is not actionable such an allegation is necessary. Newell on Defamation, 849. The general issue admits the inducement that the charge was untrue. *Thomas v. Dunaway*, 30 Ill. 373. And it is generally held that no proof, even for the purpose of mitigating the damages, can be heard which tends to prove the charge to be true. *Thomas v. Dunaway*, *supra*; *Regnier v. Cabot*, 2 Gilm. 38; *Shehan v. Collins*, 20 Ill. 828; *Storey v. Early*, 86 id. 461; Newell on Defamation, 790.

The general issue denies the speaking, and, even if a plea of justification is also filed, the plaintiff must prove the speaking. *Farnan v. Childs*, 66 Ill. 544; formerly *contra*, *Aldermann v. French*, 1 Pick. 1.

It has been held that the malice is always in issue, and that on that question the burden is upon the plaintiff, and consequently no plea of justification can cover that ground and entitle the defendant to open and close. See *Best's Right to Begin*, 120, note; *Thompson on Trial*, § 230; *Fry v. Bennett*, 28 N. Y. 324; *Mercer v. Wholl*, 5 Ad. & El. 447-53. See generally, *Gilman v. Lowell*, 8 Wend. 596, 24 Am. Dec. 96. But other authorities hold the opposite, and the *lex loci* must be examined in each case. Newell on Def. 811; *McCoy v. McCoy*, 106 Ind. 492; *Vifquain v. Finch*, 15 Neb. 505. The damages may be consequential and punitive (1 *Sutherland on Dam.* 66, 717; *Cutler v. Smith*, 57 Ill. 252); and in some jurisdictions may include attorneys' fees for prosecuting the suit. *Finney v. Smith*, 31 Ohio St. 529, 27 Am.

to wit, of the value of — pounds, and unjustly detained the same, against sureties and pledges, until, etc. Wherefore the said A. B. saith that he is injured, and hath sustained damage to the value of — pounds; and therefore he brings his suit, etc. (*h*)

(A) 8 Went. 24.

Rep. 524, note. *Contra*, Hoadley v. Watson, 45 Vt. 298, 12 Am. Rep. 197, note. Codes and statutes have modified the rules as to the effect of pleading in such cases. See Gilman v. Lowell, 8 Wend. 373, 24 Am. Dec. 96, note.

Malicious prosecution is another action on the case akin to slander and libel, and in which malice is the gist of the action. In some cases where an arrest has been made it is difficult to tell whether the remedy is case or trespass, as in both the force may be the same.

Malicious prosecution consists in instituting a suit or *proceeding* without probable cause, with malice, and generally which has terminated in favor of the accused. Cooley on Torts, 181. See Josselyn v. McAllister, 22 Mich. 300. The great leading case in America is *Savacool v. Boughton*, 5 Wend. 170, exhaustively annotated in 21 Am. Dec. 181-209.

Action will lie for suing out civil process. *Lawrence v. Hageman*, 56 Ill. 69; Cooley on Torts, 187, note 5; *Spaids v. Barrett*, 57 Ill. 290. Malicious prosecution will lie for maliciously suing out *capias* or attachment, even though there was a valid debt, if there was no probable cause for the *capias* or attachment. In such a case there is no need that the prosecution be ended. See Josselyn v. McAllister, 22 Mich. 300; Cooley on Torts, 188, 187, notes; *Spaids v. Barrett*, 57 Ill. 289; *Tomlinson v. Warner*, 9 Ohio, 104; *Collins v. Hayte*, 50 Ill. 337; *Nelson v. Danielson*, 82 id. 545. See valuable note to Will-

iams v. Hunter, 3 Hawks (N. C.), 545, 14 Am. Dec. 597-603. Causing arrest for more than what plaintiff knows is due is malicious prosecution. *Austin v. Debnam*, 3 B. & C. 139.

Trespass for false imprisonment will not lie for an arrest on process unless it was void or annulled at time of arrest, even though it was prosecuted without probable cause and with malice. Case is the only remedy. *Plummer v. Dennett*, 6 Greenlf. 421, 20 Am. Dec. 816; 1 Hilliard on Torts, 199-203, 407; *Thompson v. Ellsworth*, 39 Mich. 720; 1 Waterman on Trespass, § 307; 1 Chitty Pl. 184; *Bissell v. Gould*, 1 Wend. 210, 19 Am. Dec. 480. Trespass for false imprisonment is for an act manifestly (*prima facie*) illegal. 1 Waterman, § 367; 1 Hilliard, 415. But is this true as to plaintiff in *capias* suit? *McGuinty v. Herrick*, 5 Wend. 245.

Case will lie to recover all the damages on account of a malicious and causeless prosecution, although court has no jurisdiction or proceedings void. *Stone v. Stevens*, 12 Conn. 219, 30 Am. Dec. 611; *Humphrey's Case*, 8 Conn. 101, 20 Am. Dec. 95; *Turner v. Walker*, 3 Gill & J. 377, 23 Am. Dec. 329; 1 Waterman on Trespass, § 367, note; 1 Chitty Pl. 133, 184; 1 Hilliard, 427, 448.

If the process is regular (not void at time of arrest) the only remedy is case for malice, etc. *Blalock v. Randall*, 76 Ill. 228. If there is some legal (1 Waterman on Trespass, 57, 60) evidence, however slight, tending to prove *all* essentials, the

§ 65. *Proceeding by bill.*—The nature and form of the declaration having been now considered, the opportunity has arrived for adverting to a method of proceeding mentioned at the commencement of the work, but not in its nature capable of satisfactory explanation till this period, viz., the proceeding *by bill* in lieu of *original writ*. This subject, therefore, at the expense of some digression, will for a short time demand the reader's attention.

Under this head two different species of proceeding present

process is not void. *Bassett v. Bratton*, 86 Ill. 152; *Johnson v. Maxon*, 28 Mich. 129; *Cooley on Torts*, 178, note.

If the process is not void, but only *erroneous*, only want of probable cause and malice will render prosecutor liable, and case is the only remedy. 1 *Waterman on Trespass*, § 807; *Bassett v. Bratton*, 86 Ill. 152; *Johnson v. Maxon*, 28 Mich. 129. Case for malicious prosecution is for an act manifestly legal (but malicious, etc.). 1 *Hilliard on Torts*, 415; 1 *Waterman on Trespass*, § 328; *Sutton v. Johnston*, 1 Term, 544. Legal advice must be upon full statement of facts. 1 *Hilliard on Torts*, 437. If actual malice is found, legal advice amounts to nothing. 1 *Hilliard on Torts*, 438.

Malice is usually a mixed question of law and fact, but by pleadings it may be a question for the court. *Kelton v. Bevins*, *Cooke* (Tenn.), 90, 5 Am. Dec. 671; *Miller v. Brown*, 8 Mo. 127, 23 Am. Dec. 692. Defendant's conduct, declarations, forwardness, zeal, etc., are evidence of malice. *Turner v. Walker*, 8 Gill & J. 877, 23 Am. Dec. 829. If men take the law into their own hands and invade the rights of another it is evidence of malice. *Farwell v. Warner*, 51 Ill. 471-2. Though the defendant act under advice and with a belief that he is right, he may be guilty of ex-

press malice. *Turner v. Walker*, 8 Gill & J. 877, 23 Am. Dec. 829; *Jacks v. Stimpson*, 18 Ill. 701.

An acquittal and discharge by a magistrate having power to bind over is evidence of want of probable cause; also refusal to find a bill by a grand jury. *Cooley on Torts*, 184. The burden of proving want of probable cause is upon the plaintiff. *Cooley on Torts*, 184. A voluntary discontinuance of proceedings is *prima facie* evidence of want of probable cause. *Cooley on Torts*, 187, note; *Collins v. Hayte*, 50 Ill. 337-353; *Burhans v. Sanford*, 19 Wend. 417. Want of probable cause cannot be inferred from express malice. *Krug v. Ward*, 77 Ill. 603. See form of an allegation of want of probable cause. *Spaids v. Barrett*, 57 Ill. 290. Probable cause must be a belief founded upon sufficient circumstances. 1 *Hilliard*, 436. Erroneous judgment as to the law no defense; defendant *must* know it. *Merriam v. Mitchell*, 18 Me. 439, 29 Am. Dec. 516. Probable cause not allowed to be proved under general issue. *Fant v. McDaniel*, 1 Brev. (S. C.) 172, 2 Am. Dec. 660. *Cf.* *White v. Fox*, 1 Bibb, 369, 4 Am. Dec. 643. Probable cause for arrest, not for suit, is what is meant in case for malicious arrest. *Spaids v. Barrett*, 57 Ill. 289; *Williams v. Hunter*, 8 Hawks, 545, 14 Am. Dec. 600.

themselves for consideration. There is a proceeding by bill, more commonly so called, which is founded on *privilege on the part of the defendant*; and there is another proceeding, also without original writ and in the nature of a proceeding by bill, though not usually so denominated, which is founded on *privilege on the part of the plaintiff*. (i)

1. Of the proceeding by bill, founded on *privilege in the defendant*.

By practice of very ancient date, in all personal suits, where an *officer* (k) ¹ or *prisoner* of the *king's bench*, or an *officer* of the *common pleas*, is *defendant*, the course has been to proceed against such defendant in the court in which he is officer or prisoner, by *exhibiting* (i. e., *filing*) (l) a *bill* against him, among the records of the court, without suing out any original writ. For when the defendant is in either of the privileged characters above mentioned, the two great purposes of the original writ are superseded. As he is actually present in court, or considered as being so, no original, of course, is requisite to *enforce his appearance*; and as he is already within the jurisdiction of the court, as its officer or prisoner, an instrument of that kind is not deemed necessary to *give authority for the institution of the suit*. This practice, however, is confined to *personal* actions; and it does not appear that actions *real* or *mixed* (m) have ever been allowed to be thus commenced. The bill filed in such cases is exactly equivalent to a declaration in a proceeding by original; the original writ and process, which are necessary preliminaries according to one form of proceeding, being conveniently passed by in the other; and the plaintiff arriving without these ceremonies, at

(i) Hale, of the King's Bench and Common Pleas (among Hargrave's Law Tracts), ch. vi. Hale mentions another privilege, viz., that *ex parte curiæ*; but observes that it is resolvable into that *ex parte defendantis*.

(k) The term *officer* includes an *attorney* of the court.

(l) *Exhibiting* seems, in its original meaning, to have imported *showing to the court*; but the bill is not now actually shown to the court; but, in the king's bench, filed with the clerk of the declarations in the king's bench office (1 Tidd, 281, 4th ed.); in the common pleas, entered with the prothonotary. 2 Sellon, 74.

(m) An *ejectment*, it is true, may be brought by bill; but in this work an *ejectment* is not considered as a mixed action.

¹ Attorneys are officers of the N. Y. 502; Merritt v. Lambert, 10 court. Ex parte Garland, 71 U. S. Paige, 352; Walmsby v. Booth, 386; Re Austin, 5 Rawle, 191, 28 Am. Barn. Ch. 478. Dec. 657; Hamilton v. Wright, 87

the statement of his cause of action, immediately and in the first instance. Accordingly the bill states the complaint exactly in the same terms as would be used in a declaration in a parallel case by original writ, and is therefore considered as belonging to a certain *form of action*, as strictly as if an original writ had issued to determine the form. Thus, if the cause of action be a debt or breach of covenant, the plaintiff, in his bill, pursues the same form that a declaration by original would pursue, founded on a writ in debt or covenant, and is accordingly said to proceed or bring his action in debt or covenant in the one case as well as in the other. The bill differs, in short, from the declaration only in some slight variation of form at the commencement and conclusion.¹

As in the king's bench and common pleas, so in the *exchequer*, the like practice obtains of filing bills in personal suits against officers and prisoners; (*n*) and such bill may also be filed in this court against *accountants*; that is, persons who have entered into account with the king in the court of exchequer. (*o*) In this court, as was observed in the commencement of the work, there is no proceeding by original; but the practice of filing bills in personal suits against persons of the descriptions above mentioned has been from very ancient time allowed, for similar reasons, as in the king's bench and common pleas.

Such is the strict and primary application of the proceeding by bill, founded on privilege in the defendant; and to this extent *only* does it obtain in the practice of the common pleas and the exchequer; being confined in those courts to cases of actual privilege, as officer, prisoner or accountant. But in the *king's bench* it has for a great length of time past been irregularly extended much beyond these its ancient limits and been applied to defendants of almost every description, whether actually privileged or not. This has been the effect of a contrivance anciently devised by the practitioners of this court for the extension of its jurisdiction, the nature of which was as follows:

When an action was contemplated against a person not al-

(n) Hale, *ubi supra*; 1 Manning, 9, 143, 149; Appendix, p. 91.

(o) Hale, *ubi supra*; 1 Manning, 9, 143.

¹ See on arrest on civil process and 288-9, note; Greer v. Young, 120 Ill. privilege, 3 Cooley's Black. (3d ed.) 184.

ready privileged as officer or prisoner, the course was for the plaintiff to cause him to be arrested upon a fictitious charge (foreign to the proposed action) of a *trespass*; and this was effected by virtue of certain judicial writs which the court had power to issue in such cases, called *bill of Middlesex and latitat*. (*p*) Upon such arrest the defendant, unless he gave bail, was committed to the prison of the court, or, according to the legal phrase, *the custody of the marshal of the Marshalsea*; and the plaintiff then commenced the action by filing a bill against him, which, as he had become *prisoner*, was authorized, as has been shown, by the regular practice of the court. If, instead of being committed to actual custody, he gave bail, this was considered as of equal effect for the purpose of founding the jurisdiction, and he was still considered as being in the custody of the marshal (*q*) and liable to have a bill filed against him.

This method, having silently crept into usage, at length established itself as an avowed and regular course of proceeding, and continues in force to the present day; subject, however, to the following important modification, that the defendant is not now *actually arrested* by virtue of the fictitious charge in the bill of Middlesex or *latitat*, unless the nature of the case be such as in itself authorizes the plaintiff to take his person. If the case be not of that description, no arrest takes place; and the defendant is committed to the custody of the marshal of the Marshalsea, only by *fiction* or *intendment of law*. Thus, by aid of the bill of Middlesex and *latitat*, the king's bench is enabled to entertain personal actions by bill, against unprivileged as well as privileged persons; for those who are not already officers or prisoners may be invested with the latter character by virtue of the real or supposed arrest and committal to the custody of the marshal. (*r*) And accordingly, the proceeding by bill has long been, in this court, one of the *regular* and *ordinary* modes of commencing a per-

(*p*) A trespass being alleged to be committed "with force and arms," was considered as partly of a *criminal* nature; and on that ground fell within the jurisdiction of this court. 3 Bl. Com. 42, 285, where the nature of the bill of Middlesex and *latitat* is more fully explained.

(*q*) 3 Reeves, 387.

(*r*) However, the proceeding by bill of Middlesex and *latitat* does not apply to parties not legally capable of arrest in a civil suit: and consequently not to *peers of the realm*, corporations, hundredors, or members of the House of Commons. 1 Tidd, 78, 4th ed.

sonal action, co-ordinate with that by original. Each method has its particular recommendations, which lead the practitioner, according to the nature of the case, to its adoption.

Such being the origin and nature of the proceeding by bill in the king's bench, the following is a summary account of its practical course. If the defendant be already privileged, no writ to compel appearance, as already explained, is requisite, but the suit is begun at once by filing the bill. On the other hand, where the defendant is not already an officer or prisoner, the plaintiff begins his proceedings by suing out a bill of Middlesex or *latitat*. These writs command the sheriff to arrest the defendant's person, and to have him in court on a certain day in term; and, like an original writ, are themselves to be returned into court on that day. However, their return differs in this respect from that of an original writ, that it is not necessarily to be made on a *general return day*, but may fall on *any* day of the term, Sundays and certain feast days excepted. Under these writs, either the defendant is arrested, if the cause of action authorize that proceeding, or if not, his appearance to the writ is otherwise enforced in such manner as the practice of the court prescribes. (s) The appearance to these writs, when effected, is expressed by a formal entry, if there have been no actual arrest, of fictitious bail in the proper office of the court (which is called *filing common bail* to the action), or, in case of actual arrest, by giving actual bail. Upon this the plaintiff exhibits his bill; but it is to be observed that, where the defendant is not actually an officer or prisoner at the time of the bill exhibited, but merely in *supposed* custody by virtue of the bill of Middlesex or *latitat*, though the plaintiff is, in strict legal language, said in this, as in other cases, to *exhibit his bill*, the instrument is in practice generally called not a *bill*, but a *declaration*; nor is it always actually *exhibited*, i. e., *filed*, but in some cases *filed*, in others *delivered*,—according to the course of practice formerly explained in treating of the manner of pleading in general. (t)

(s) For information on this subject, *vide* 1 Tidd, 78, 94, 144, 149, 4th ed.

(t) *Supra*, p. 106.

Of the bill or declaration in the king's bench against a prisoner, whether real or supposed, the following is an example:

BILL

(Against an actual prisoner),

Or,

DECLARATION

(Against a supposed prisoner).

(In debt — on a bond.)

Ellenborough and Markham.

— Term, in the — year of the reign
of King George the Fourth.

Middlesex, to wit, A. B. complains of C. D. being in the custody of the marshal of the Marshalsea of our lord the now king, before the king himself, of a plea that he render to the said A. B. the sum of — pounds, of good and lawful money of Great Britain, which he owes to and unjustly detains from him. And thereupon the said A. B., by E. F., his attorney, complains: For that whereas the said C. D., heretofore, to wit, on the — day of —, in the year of our Lord —, at Westminster, in the county of Middlesex, by his certain writing obligatory, sealed with his seal, and now shown to the court here (the date whereof is the day and year aforesaid), acknowledged himself to be held and firmly bound to the said A. B. in the sum of — pounds, above demanded to be paid to the said A. B.; yet the said C. D., although often requested, hath not as yet paid the said sum of — pounds above demanded, or any part thereof, to the said A. B.; but so to do hath hitherto wholly refused, and still refuses, to the damage of the said A. B. of ten pounds; and therefore he brings his suit, etc.

Pledges to prosecute, { JOHN DOE
and
RICHARD ROE.

2. The proceeding by bill, founded on *privilege in the plaintiff*, is apparently of the same antiquity as that founded on privilege in the defendant and seems to rest on an analogous principle. In the king's bench and common pleas, in all personal suits where an *officer* of the court is *plaintiff*, he is allowed to file or deliver a declaration (for it is in this case usually called by that name and not by that of *bill*), without having previously obtained an original writ; the defendant's appearance being first enforced by a writ of the judicial kind, returnable in the same manner as a bill of Middlesex or *latitat*, (u) and called an *attachment of privilege*.

(u) *Vide supra*, p. 131.

So in the *exchequer*, an *officer* of the court, when plaintiff, is allowed, in any personal action, to enforce the defendant's appearance by judicial writs, returnable on any day in the term (Sundays and certain feast days excepted), and called *venire facias ad respondendum* and *capias of privilege*, (x) and then to file or deliver a declaration against him; and in this court the king's *accountant* or *debtor* has a similar privilege,—appearance at his suit being enforced by similar writs,—though the *capias* is in that case commonly called a *quo minus*. (y) And this was formerly the whole extent of this court's jurisdiction in respect of privilege in the plaintiff; but an irregular method was in course of time devised for its extension, analogous to that of the bill of Middlesex and *latitat* in the king's bench. The contrivance was simply that of suing out a *venire facias* or *quo minus*, containing a *fictitious* suggestion that the plaintiff was *debtor* to the king. In the character of such debtor, he would be entitled (as already shown) to institute that method of proceeding; and the fiction by which he assumed the character was allowed to pass without scrutiny. (z) The proceeding by *venire* and *quo minus* was thus surreptitiously extended to plaintiffs of every description; and the effect, therefore, is, that by means of those writs a personal action may be and is constantly brought in the exchequer at the suit of any plaintiff, whether really privileged or not; the course of proceeding being, first, to sue out a *venire* or *quo minus* to compel appearance, containing either a true or a fictitious suggestion of the kind above mentioned, and, upon appearance, to file or deliver a declaration,—the instrument being usually called in practice by that name, but, in more strict legal phrase, a bill.

§ 66. **The manner of pleading.**—The subject of proceeding by bill being now sufficiently discussed, it is time to resume the consideration of the *manner of pleading*.¹ And it is to be

(x) Manning's Exchequer, 14, 58, 142. In strictness, however, these writs are not independent of each other; but the *capias* is supposed to issue on a precedent *venire*. 1 Manning, 58.

(y) 1 Manning, 58. It is so called from its containing, in this case, a clause of *quo minus sufficiens existit*; alleging that the plaintiff, in consequence of the injury committed by the defendant, is less able to pay his debt to the king.

(z) Vide Appendix, note (16).

¹ Stephen takes frequent occasion what to plead but how to plead, hence to bring out that his chief idea is not it was no part of his plan to discuss

understood that what follows is equally applicable to an action by original and by bill; for, from the period of the bill or declaration, the subsequent course of the suit is the same in either method of proceeding, some slight and occasional variations of form only excepted.

The plaintiff having *declared* (*i. e.*, filed or delivered his declaration), it is for the defendant to concert the manner of his defense. For this purpose he considers whether, on the face of the declaration, and supposing the facts to be true, the plaintiff appears to be entitled, in point of *law*, to the redress he seeks and in the form of action which he has chosen. If he appears to be not so entitled in point of law, and this by defect either in the *substance* or the *form* of the declaration, *i. e.*, as disclosing a case insufficient on the merits, or as framed in violation of any of the rules of pleading, the defendant is entitled to except to the declaration on such ground. In so doing he is said to *demur*; and this kind of objection is called a *demurrer*. (a)

§ 67. *Demurrer*.—A demurrer (from the Latin *demorari*, or French *demorrer*, to wait, or stay) imports, according to its etymology, that the objecting party *will not proceed* with the pleading, because no sufficient statement has been made on the other side; but will wait the judgment of the court whether he is bound to answer.¹ The form of a demurrer to a declaration will appear by the following examples:

(a) See Appendix, note (17).

the elements of causes of action or what facts to plead or the evidence under particular pleading. In the present edition some attention is paid to the elements of causes and the evidence, with the idea to render the book more useful and complete.

¹ *Haiton v. Jeffreys*, 10 Mod. 280; *Ames' Cases*, 6; *Leaves v. Bernard*, 5 Mod. 132; *Davies v. Gibson*, 2 Ark. 117; *Tyler v. Hand*, 7 How. 573. This statement in the text is generally cited by courts, text-writers and compilers of dictionaries. See *Anderson's Law Dict.*; *Bouvier's Law Dict.*, tit. *Demurrer*.

By proceeding with the trial on the merits without demanding a ruling on his demurrer, the defendant waives formal objections. *Danielson v. Gude*, 11 Colo. 87. Facts not appearing on the face of the bill cannot be considered on demurrer. *Stewart v. Masterson*, 131 U. S. 151.

At common law, if the declaration, by fair construction of the language, states a cause of action, it is good. *Cook v. Scott*, 1 Gilman. 333; *People v. Lane*, 36 Ill. App. 649.

In Iowa the code permits a demurrer only when the petition, "by a fair and natural construction, does

DEMURRER

To the Declaration.

For matter of substance.

(In debt.)

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

C. D. }
ats (b) }
A. B. }

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said A. B. to have or maintain his aforesaid action against him, the said C. D.; and that he, the said C. D., is not bound by the law of the land to answer the same. And this he is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the said C. D. prays judgment, and that the said A. B. may be barred from having or maintaining his aforesaid action against him, etc.

DEMURRER

To the Declaration.

For matter of form.

(In debt.)

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

C. D. }
ats }
A. B. }

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc.; and says that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said A. B. to have or maintain his aforesaid action against the said C. D., and that he, the said C. D., is not bound by the law of the land to answer the same. And

(b) *I. e., at suit of.*

not show a substantial cause of action." *McFaul v. Ramsey*, 20 How. 523; *Birdseye v. Smith*, 32 Barb. 219. If the want of jurisdiction be apparent on the face of the declara-

tion, the defect may be taken advantage of by demurrer or motion. *Susquehanna & W. V. R. Co. v. Blatchford*, 78 U. S. 172.

this he is ready to verify. Wherefore, for want of a sufficient declaration in this behalf, the said C. D. prays judgment, and that the said A. B. may be barred from having or maintaining his aforesaid action against him, etc. And the said C. D., according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer to the said declaration: that is to say, that no day or time is alleged in the said declaration at which the said causes of action or any of them are supposed to have accrued. And also that the said declaration is in other respects uncertain, informal and insufficient.

§ 68. **Pleas.**—If the defendant does not demur, his only alternative method of defense is to oppose or answer the declaration by matter of *fact*. In so doing he is said to *plead* (c) (by way of distinction from *demurring*), and the answer of fact so made is called the *plea*.

Pleas are divided into pleas dilatory and peremptory; and this is the most general division to which they are subject. (d) ¹

Subordinate to this is another division. Pleas are either *to the jurisdiction of the court, in suspension of the action, in abatement of the writ, or in bar of the action*; the three first of which belong to the dilatory class, the last is of the peremptory kind. (e)

§ 69. **A plea to the jurisdiction** is one by which the defendant excepts to the jurisdiction of the court to entertain the action.² The following is an example:

(c) See Appendix, note (18).

(d) See Appendix, note (19).

(e) See Appendix, note (20).

¹ *Pitts' Sons' Mfg. Co. v. Commercial Nat. Bank*, 121 Ill. 582. The code courts do not distinguish between the different classes of pleas (Bliss, § 345; *Gardner v. Clark*, 21 N. Y. 399. Cf. *Gardner v. Ogden*, 22 N. Y. 327), but the judge in charging the jury does. *Id.*; *Pomeroy*, Code Rem., § 697. It allows them to be set up in one document called an answer. *Fordyce v. Hathorn*, 57 Mo. 120. But this is not so in Indiana by statute. *Dwiggins v. Clark*, 94 Ind. 49. Matter in abatement and matter in bar may be united in the same

answer. *Christian v. Williams*, 111 Mo. 429.

² Courts of general jurisdiction are presumed to have jurisdiction of the subject-matter of a cause unless the contrary appears; but in suits before the United States courts jurisdiction must be shown. *Dred Scott v. Sandford*, 19 How. 393, *Curtis, J.*, dissenting.

Jurisdiction is said to be of three kinds: Of the subject-matter, of the person, and of the thing. *Cooper v. Reynolds*, 10 Wall. 308. To this may be added, or it may be included in

PLEA TO THE JURISDICTION.

In an action of ejectment for lands situate within a county palatine.

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

C. D. }
ats }
A. B. }

And the said C. D., in his proper person, comes and defends the force and injury, and says that the said county of Chester is, and from time whereof the memory of man is not to the contrary hath been, a county palatine; and there now are and for all the time aforesaid have been justices there; and that all and singular pleas for the recovery of manors, messuages and tenements, lying and being within the said county, have been for all the time aforesaid, and still are, pleaded and pleadable within the said county of Chester, before the jus-

the first, jurisdiction of the process or particular remedy. *Grumon v. Raymond*, 1 Conn. 40; *Gurney v. Tufts*, 87 Me. 183.

Consent cannot give a court jurisdiction of the subject-matter of an action, but it may of parties. *Brady v. Richardson*, 18 Ind. 1; *Cooper v. Reynolds*, 10 Wall. 808.

As a general rule, want of jurisdiction of the subject-matter may be taken advantage of at any time it appears during the progress of the suit. *Black's Ex'rs v. Black's Ex'rs*, 84 Pa. St. 354. It is said where the defendant pleads to the merits in the first instance, without insisting upon the want of jurisdiction, that the objection is waived. Answer after objection made and overruled is not a waiver of the objection. *Harkness v. Hyde*, 98 U. S. 476; *So. Pac. R. Co. v. Denton*, 146 U. S. 202.

Pleas of this description, says Chitty, though in effect they abate the writ, yet differ from pleas in abatement, principally in three points, viz.: that they must be pleaded in person; that only half

defense should be made, and that they should conclude *si curia cognoscere velit* (whether the court should take cognizance), and not *quod billa cassetur* (that the bill may be quashed). 1 Chitt. 441.

In United States courts, where the citizenship necessary to give jurisdiction appears on the face of the record, evidence to contradict it can be admitted only under plea in abatement in the nature of a plea to the jurisdiction. *Farmington v. Pillsbury*, 114 U. S. 188; *Hartog v. Memory*, 116 id. 588.

Under the Washington code, if want of jurisdiction does not appear on face of complaint the defect may be pleaded in the answer. The defendant may demur if the defect appears upon the face of the complaint. Plea in abatement is unnecessary before answering to the merits. *Greene v. Tacoma*, 58 Fed. Rep. 562.

A plea to the jurisdiction must show that there is another court in the state that has jurisdiction. *Fain v. Crawford*, 91 Ga. 80; *Ridling v. Stewart*, 77 id. 589.

tices there for the time being, and not here in the court of our lord the king, before the king himself. And this he is ready to verify. Wherefore, since the plea aforesaid is brought for recovery of the possession of the manors, messuages, lands and hereditaments aforesaid, within the said county palatine, the said C. D. prays judgment if the court of our lord the king here will or ought to have farther cognizance of the plea aforesaid. (f)

§ 70. A plea in suspension of the action is one which shows some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed until that ground be removed. The number of these pleas is small. Among them is that which is founded on the non-age of one of the parties, and is termed *parol demurrer*. (g)¹ Its form is as follows:

PAROL DEMURRER.

In debt, by an heir sued on the bond of his ancestor.

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

C. D. }
ats
A. B. }

And the said C. D., by — —, his attorney, who is admitted by the court of our said lord the king here as guardian of the said C. D., to defend for the said C. D., who is an in-

(f) 1 Went. 49.

(g) See Appendix, note (21).

¹ This paragraph is cited in Chitty's Pl. (14th Am. ed.) 447. He treats the subject as included in abatement, instancing only the case of injury in real actions, and noticing that this parol demurrer is abolished in England. The distinction between pure pleas in abatement of the suit and in bar of the action for some disability which could not be removed, and a plea in suspension of the suit, which merely causes the suit to remain *in statu quo* until the disability is removed, is clear, and has been often applied to temporary disability by alienage, etc. Faulkland v. Hanson, 12 Mo. App. 400; Le Brett v. Papillon, 4 East. 502; Hutchinson v. Brook, 11 Mass. 119. In the last case Judge Sewell says: "In time of war the plea of alien enemy is a temporary disability only, which ceases with the war. It is still called a plea in abatement, although the effect of it is not to abate the writ, or defeat the process entirely, but to suspend it; and the plea is defective when it concludes either in bar or in abatement of the writ. The former is a prayer whether the plaintiff shall be further answered, and the judgment to be entered upon it, when it shall be con-

fant under the age of twenty-one years, comes and defends the wrong and injury, when, etc., and saith that he, the said C. D., is within the age of twenty-one years, to wit, of the age of — years, to wit, at — aforesaid, in the county aforesaid. And this he is ready to verify. Wherefore he does not conceive that during his minority he ought to answer the said A. B. in his said plea. And he prays that the parol may demur (h) until the full age of him, the said C. D. (i)

§ 71. A plea in abatement of the writ is one which shows some ground for *abating* or *quashing* the original writ, and makes prayer to that effect. (k)¹

(h) *Parol* is the French word for *loquela*, which was the most ancient appellation of the *pleading* (*vide supra*, p. 101); *demur* is from *demorror*, to stay. That the parol may demur means, therefore, that the pleading may be stayed.

(i) 2 Chitty, 472; *Plaskett v. Beeby*, 4 East, 485.

(k) See Appendix, note (22).

fessed or maintained, is that the writ aforesaid remain without day, *donec terræ fuerint communes*, until the intercourse or the peace of the two countries shall be restored. Where the effect of a plea is a temporary disability of the plaintiff, and nothing more, a prayer of judgment of the writ is bad."

¹ Matter which merely defeats the present maintainance of the suit, but which does not deny a right to a remedy, is matter in abatement. *Pitts' Sons' Mfg. Co. v. Com. Nat. Bank*, 121 Ill. 582; *Culver v. Johnson*, 90 id. 91; *Straight v. Hanchett*, 23 Ill. App. 584. The conclusion of the plea determines its nature. *Pitts' Sons' Mfg. Co. v. Com. Nat. Bank*, *supra*.

Any defect in the writ, its service or return, which is apparent from an inspection of the record, may be taken advantage of by motion. But where the objection is founded upon extrinsic facts, the matter must be pleaded in abatement, so that an issue may be made thereon and tried, if desired, by a jury, like any other issue of fact. *Greer v. Young*, 120 Ill. 184; *Pitts' Sons' Mfg. Co. v. Com. Nat. Bank*, 121 id. 582.

Plea in abatement, if it prevails,

ends the suit. *Kerr v. Willetts*, 48 N. J. L. 78.

Pleas in abatement being of a dilatory character are not favored. But a plea setting up that there is another suit pending for the same cause of action has a more favorable position in court than one merely dilatory. Still such a plea must not, in its frame, omit any of the essential requirements of law. *Buckles v. Harlan*, 54 Ill. 361.

If there is the least inaccuracy in this plea it cannot be supported. Lord Kenyon in *Roberts v. Moore*, 5 T. R. 488. The plea must be so complete and certain that the court can see that no answer can be made to its allegations but a denial of their truth or their sufficiency. 1 Chitty Pl. 445; *Gould v. Smith*, 30 Conn. 90. No implication can aid it. Mr. Justice McLean in *Scott v. Sanford*, 19 How. 393. Where in the commencement of the plea judgment was prayed of the writ and declaration, and in the conclusion of the writ only, it was held that this did not vitiate it, being matter of form. *Buckles v. Harlan*, 54 Ill. 361. Concerning pleas in abatement, see 3 Cooley's Black. (3d ed.) note.

The grounds for so abating the writ are any matters of fact tending to impeach the correctness of that instrument; *i. e.*, to show that it is improperly framed or sued out, without at the same time tending to deny the right of action itself. Thus, if there be a variance between the declaration and the writ, this shows that the writ was not properly adapted to the action, and is therefore a ground for abating it. So, if the writ appear to have been sued out pending another action already brought for the same cause,¹ — if it name only one person as defendant when it should have named several, — or if it appear to have been defaced in a material part, — it is for any of these reasons abatable. (Δ)²

Pleas in abatement relate either —

To the person of the plaintiff,
To the person of the defendant,
To the count or declaration, — or
To the writ. (m)

^(Δ) The different grounds or subjects of pleas in abatement will be found enumerated Com. Dig., Abatement (E.) — (H. 56).

(m) 1 Chitty, 435; Com. Dig., Abatement, C.

¹ That there is another suit pending for the same cause must be pleaded in abatement. *Moore v. Spiegel*, 148 Mass. 413. Pendency of another suit in federal courts in the same territorial jurisdiction will abate. *Smith v. Atlantic Mut. Ins. Co.*, 22 N. H. 21. Pendency of a suit for the same cause by the same plaintiff against the same defendant in another territorial jurisdiction cannot be pleaded in abatement. *Walsh v. Durkin*, 12 Johns. 99; *Humphries v. Dawson*, 38 Ala. 199; *Smith v. Lathrop*, 44 Pa. St. 326; *Stanton v. Embrey*, 93 U. S. 548; *Kerr v. Willetts*, 48 N. J. L. 78; *Hatch v. Spofford*, 22 Conn. 485. Nor can a suit be abated by a plea that an another action was *afterwards* commenced. *Nicholl v. Mason*, 21 Wend. 339. Nor will a writ *in personam* at common law be abated by the pendency of a prior suit *in rem* in admiralty. *Granger v. Circuit Judge*, 27 Mich. 406.

Abatement is the only way to take advantage of non-joinder of defendants *in contractu*. *Nealy v. Moulton*, 12 N. H. 485; *Southard v. Hill*, 44 Me. 92; *Metcalf v. Williams*, 104 U. S. 93; *McGregor v. Balch*, 17 Vt. 562. If one tenant in common be sued in trespass, trover or case for anything respecting the land held in common, he may plead the tenancy in abatement. *Id.* A good plea in abatement must aver that the person not joined is alive and within the jurisdiction of the court. *Palmer v. Field*, 59 N. Y. S. R. 180; *Goodhue v. Luce*, 32 Me. 222.

² In New Hampshire no writ or declaration shall be abated, quashed or reversed for any error or mistake, where the person or case may be rightly understood by the court. *Adams v. Wiggin*, 42 N. H. 553.

A plea in abatement to the *person* of the plaintiff or defendant is such as shows some personal disability in one of these parties to sue or be sued;¹ as, that the plaintiff is an alien enemy.² With respect to these pleas to the person, it is to be observed that they do not fall strictly within the definition of pleas in abatement, as above given; for they do not pray "that the writ be quashed," but pray judgment "if the plaintiff ought to be answered." However, as such pleas offer an objection of form rather than substance, and do not deny the right of action itself, they are considered as in the nature

¹ A suit may be abated on account of the infancy of the plaintiff. *Schemerhorn v. Jenkins*, 7 Johns. 373.

The marriage of a *feme sole* pending suit abates the action, and must be pleaded before a plea in bar. But if the marriage does not take place till after the plea in bar, it must be pleaded before the next continuance. *Swan v. Wilkinson*, 14 Mass. 295; *Chirac v. Reinicker*, 11 Wheat. 280; *Wilson v. Hamilton*, 4 S. & R. 238.

That one claiming to be the guardian of the plaintiff is not authorized to maintain the action for the plaintiff may be pleaded in abatement. *Conkey v. Kingman*, 24 Pick. 115. And see as to executors, *Kane v. Paul*, 14 Pet. 38; *Childress v. Emory*, 8 Wheat. 642.

That the plaintiff is a fictitious person may be taken advantage of by abatement. *Doe v. Penfield*, 19 Johns. 308.

It is sometimes said that the fact that there is no such person can be taken advantage of only by plea in abatement. See 1 Chitt. Pl. (Perkins' 14th Am. ed.) 449, note 2. But this is erroneous. See *Boston Type Foundry v. Spooner*, 5 Vt. 93.

Where it is discovered that the plaintiff is a fictitious person or a supposed corporation which could

have no existence, or a thing that could not have or owe rights, the case must be dismissed. *Mexico Mill Co. v. Yellow Jacket Co.*, 4 Nev. 40, 97 Am. Dec. 510; *Detroit Schuetzen Bund v. Agitations Verein*, 44 Mich. 313; *Alvarez v. Brennan*, 7 Cal. 503, 68 Am. Dec. 274; *The Steamboat Burns*, 9 Wall. 237. Where the entity may sue, but has used an im- proper name, or its own name when it should sue by trustees, etc., advantage must be taken by plea in abatement or *nul tiel corporation* in the lower courts. *Ada St. M. E. Church v. Garnsey*, 66 Ill. 132.

² It is a general rule that a plea in abatement must give the plaintiff a better writ. *American Exp. Co. v. Haggard*, 37 Ill. 465. But this does not apply to such cases as those of outlawry, attainder, alien enemy, etc., where the right of action is suspended on account of the disability of plaintiff to sue, and where he cannot have a better writ. *Boston Type Foundry v. Spooner*, 5 Vt. 93. The plea of alien enemy is a temporary disability only; and its effect is not to defeat the action, but to suspend it. A prayer of judgment on the writ is therefore bad. *Hutchinson v. Brock*, 11 Mass. 119. See *Suspension of Action*, and note, *ante*.

of pleas in abatement, and classed among them. (n)¹ A plea in abatement to the *count* or declaration is such as is founded on some objection applying immediately to the declaration, and only by consequence affecting the writ. The only frequent case in which this kind of plea has occurred is where the objection is that of a variance in the declaration from the writ, which was always a fatal fault. (o)² Even in this case, however, the plea is now out of use, in consequence of a change of practice relative to the original writ that will be presently explained. A plea in abatement to the *writ* is such as is founded on some objection that applies to the writ itself; for example, that in an action on a joint contract it does not name as defendants all the joint contractors, but omits one or more of them. Pleas of this latter kind have been very anciently divided into such as relate to the *form of the writ* and such as relate to the *action of the writ*; and those relating to its *form* have been again subdivided into such as are founded on objections *apparent on the writ itself*, and such as are founded on *matter extraneous*. (p)³

(n) See Appendix, note (23).

(o) There were, however, other instances in which this kind of plea was used. See Co. Litt. 303 b, where it is said that "any imperfection in the count doth abate the writ." See, also, Com. Dig., Abatement, G. 7, G. 8.

(p) 1 Chitty, 435; Com. Dig., Abatement, C. These divisions of pleas in abatement to the writ seem to be more subtle than useful, and do not, in modern practice, often come under consideration.

¹ Pleas in abatement arising from privilege of person ought to be classed under pleas to the jurisdiction. 1 Chitt. Pl. 478; United States v. Benner, Bald. 240; Drake v. Drake, 83 Ill. 526. But such plea will not be adjudged bad on demurrer because it prays judgment on the writ. Drake v. Drake, *supra*.

² See Duvall v. Craig, 2 Wheat. 45; Chirac v. Reinicker, *supra*; McKenna v. Fisk, 1 How. 241.

³ Pleas to the form of the writ are mostly for matter *dehors*, such as misnomer of plaintiff or defendant. See Reid v. Lord, 4 Johns. 118. Pleas of misnomer were abolished in England by 3 and 4 William IV., chapter 42, section 11. Misnomer of

plaintiff, even in case of a corporation, can be taken advantage of by plea in abatement only. Mayor of Stafford v. Bolton, 1 Bos. & Pul. 40; Medway Manufactory v. Adams, 10 Mass. 360. A plea in abatement was sustained to a declaration in which a name was stated as "Clendenard," when the right name was "Clendenin." Oates v. Clendenard, 87 Ala. 734.

The word *junior* not being a part of the name may be added or omitted. See Headley v. Shaw, 39 Ill. 354; Kincaid v. Howe, 10 Mass. 208; State v. Grant, 21 Me. 171; Jameson v. Isaacs, 12 Vt. 611.

The middle name was by common law no part of a man's name, and

The following are examples of pleas in abatement:

PLEA IN ABATEMENT OF THE WRIT.

To the person of the plaintiff.

(In debt.)

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

C. D. }
ats
A. B. }

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says that the said A. B. ought not to be answered to his writ and declaration aforesaid, because, he says, that the said A. B. is an alien born, to wit, at Calais, in the kingdom of France, in parts beyond the seas under the allegiance of the king of France, an enemy of our lord the now king, born of father and mother adhering to the said enemy; and that the said A. B. entered this kingdom without the safe conduct of our said lord the king. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to be answered to his writ and declaration aforesaid, (q) etc.

(q) Lill. Ent. 1; Mod. Ent. 9; 1 Went. 42, 29.

consequently the omission of the middle name or initial was immaterial. See *Franklin v. Talmadge*, 5 Johns. 84; *Schofield v. Jennings*, 68 Ind. 232; *Re Snook*, 2 Hilt. 568; *State v. Martin*, 10 Mo. 801; *Hart v. Lindsey*, 17 N. H. 235, 43 Am. Dec. 597; *Bletch v. Johnson*, 40 Ill. 116. But in Massachusetts the middle name or initial must be regarded. See *Parker v. Parker*, 146 Mass. 820. See, also, *King v. Hutchins*, 28 N. H. 580.

The omission of the Christian name or merely giving the initials is abatable. *Peden v. King*, 80 Ind. 181; *Morris v. Graves*, 4 Strobb. L. 82. A name is the title used for identification, and the intent of its requirement is certainty of such identification. *Lafin & Rand Powder Co. v. Steytler*, 146 Pa. St. 434, 14 L. R. A. 690. The doctrine of *idem sonans* applies to words the pronunciation of which, in conversation, appears to be identical. The courts are especially liberal in the case of foreign names. See *Barnes v. People*, 18 Ill. 52; *Millett v. Blake*, 81 Me. 531; *Belton v. Fisher*, 44 Ill. 32; *Chiniquy v. Bishop of Chicago*, 41 id. 148; *Stevens v. Stebbins*, 4 id. 25.

PLEA IN ABATEMENT OF THE WRIT.

To the writ.(In *assumpsit*.)

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.C. D. }
ats }
A. B. }

And the said C. D., by — —, his attorney, comes and defends the wrong and injury when, etc., and prays judgment of the said writ and declaration, because he says that the said several supposed promises and undertakings in the said declaration mentioned (if any such were made) were made jointly with one G. H., who is still living, to wit, at —, and not by the said C. D. alone. And this the said C. D. is ready to verify. Wherefore, inasmuch as the said G. H. is not named in the said writ together with the said C. D., he, the said C. D., prays judgment of the said writ and declaration, and that the same may be quashed. (r)

The effect of all pleas in abatement, if successful, is that the particular action is defeated. But on the other hand, the right of suit itself is not gone; and the plaintiff, on obtaining a better form of writ, may maintain a new action, if the objection were founded on matter of abatement; or, if the objection were to the disability of the person, he may bring a new action when that disability is removed.

§ 72. *Oyer of the writ.*— Such is, in its principle, the doctrine of pleas in abatement; but the actual power of using these pleas has been much abridged, and the whole law of original writs consequently rendered of less prominent importance than formerly, by a rule of practice laid down in modern times. With respect to such pleas in abatement as were *founded on facts that could only be ascertained by examination of the writ itself*, as, for example, variance between the writ and declaration, or erasure of the writ, it was always held a necessary matter of form, preparatory to pleading them, to *demand oyer* of the writ, (s) that is, to demand *to hear it read*; which, in the days of oral pleading, was complied with by reading it aloud in open court, and, after the establishment of written pleadings, by delivering a copy of

(r) 2 Chitty, 415.

(s) Com. Dig., Pleader, p. 2; 1 Saund. 318, n. 3; Salk. 668.

the instrument. The court of common pleas, however, in the 11 and 12 Geo. II., and the king's bench, in the 19 Geo. III., (z) thought fit to establish it as a rule, that thenceforthoyer should not be granted of the original writ; and the indirect effect of this has consequently been to abolish in practice all pleas in abatement founded on objections of the kind here stated. But there are pleas in abatement which *do not require any examination of the writ itself*. For example, if in the declaration one only of two joint contractors is named defendant, this is sufficient to show that the same non-joinder exists in the writ; for, as a variance between the writ and declaration is a fault, (u) the defendant is entitled to assume that they agree with each other; and he may consequently, without production of the writ, plead this misjoinder as certainly existing in the latter instrument. So the plea that the writ was sued out pending another action, or pleas to the person of the plaintiff or defendant, require no examination of the writ itself, and there are many others to which the same remark applies. In all such cases nooyer is necessary; and therefore pleas of this latter description may be, and are in fact, still pleaded, notwithstanding the rule of practice which deniesoyer of the writ.

In this explanation of pleas in abatement, the case of a proceeding by *original writ* has been hitherto exclusively supposed; the law relating to these pleas having been devised and originally applied at a period when proceedings by *bill* were either unknown or not in common use, and therefore having a more immediate and strict reference to proceedings by original. It is, however, to be understood that there are pleas in abatement of *the bill* also, by analogy to those in abatement of *the writ*. In form they differ from pleas in abatement of the writ only in praying judgment, if the plaintiff ought to be answered "*to his bill*," or "that the *bill* be quashed,"—instead of making the like prayer with respect to "*writ and declaration*." (x)

§ 73. Pleas in bar.—A *plea in bar of the action* may be defined as one which shows some ground for barring or de-

(z) Doug. 227; 1 Saund. 318, n. 3.

(u) *Vide supra*, p. 140.

(x) See Appendix, note (94).

feating the action, and makes prayer to that effect. (y) A plea in bar is therefore distinguished from all pleas of the dilatory class, as impugning the right of action altogether, instead of merely tending to divert the proceedings to another jurisdiction, or suspend them, or abate the particular writ.¹ It is, in short, a substantial and conclusive answer to the action. (z) It follows from this property that in general it must either deny all or some substantial part of the averments of fact in the declaration; or, admitting them to be true, allege new facts which obviate or repel their legal effect.² In the first case the defendant is said, in the language of pleading, to *traverse* (a) the matter of the declaration; in the latter, to *confess and avoid* it. Pleas in bar are consequently divided into pleas *by way of traverse*, and pleas *by way of confession and avoidance*.³

Of pleas in bar of each of these descriptions the following are examples:

PLEA IN BAR.

By way of Traverse.

In covenant, on indenture of lease — For not repairing.

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

C. D. }
ats
A. B. }

And the said C. D., by — —, his attorney, comes and defends the wrong and injury when, etc., and says that the

(y) See Appendix, note (28).

(z) The different grounds or subjects of pleas in bar, in each different form of action, will be found enumerated in Com. Dig., Pleader, etc. (3 A.) — (3 O. 19).

(a) See Appendix, note (26).

¹ Pleas in bar are not to receive a narrow and merely technical construction, and are to be determined, not by a disjoining of their members, or by laying stress on what may be immaterial, but according to their entire subject-matter. *Withers v. Greene*, 9 How. 218.

In abatement the court will give only the proper judgment prayed for by the party; but on a plea in

bar the party may have a right judgment upon a wrong prayer. The *King v. Shakspeare*, 10 East, 87; *Rowles v. Lusty*, 4 Bing. 428.

² See *Bouvier's Law Dict.*, tit. Pleading.

³ Every answer, under the code, should be as full and complete as a special plea was required to be at common law. *Ayrault v. Chamberlain*, 38 Barb. 229.

said A. B. ought not to have or maintain his aforesaid action against him, the said C. D., because he says that the windows of the said messuage or tenement were not in any part thereof ruinous, in decay or out of repair, in manner and form as the said A. B. hath above complained against him, the said C. D. And of this he puts himself upon the country. (b)

PLEA IN BAR.

By way of Confession and Avoidance.

In a like action.

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

C. D. }
ats
A. B. }

And the said C. D., by — —, his attorney, comes and defends the wrong and injury when, etc., and says that the said A. B. ought not to have or maintain his aforesaid action against him, the said C. D., because he says that after the said breach of covenant, and before the commencement of this suit, to wit, on the — day of —, in the year of our Lord —, at — aforesaid, in the county aforesaid, the said A. B., by his certain deed of release, sealed with his seal, and now shown to the court here (the date whereof is the day and year aforesaid), did remise, release and forever quitclaim to the said C. D., his heirs, executors and administrators, all damages, cause and causes of action, breaches of covenant, debts and demands whatsoever, which then had accrued to the said A. B., or which the said A. B. then had against the said C. D.; as by the said deed of release, reference being thereto had, will fully appear. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action against him.

§ 74. *Arrival at issue.*—The nature of a demurrer to the declaration and of plea, and the different kinds of plea, being now explained, we will continue our examination of the process of pleading, and will first suppose that the defendant takes the course of pleading to the declaration, in bar, by way of *traverse*. In this case it is evident that a question is at once raised between the parties; and it is a question of *fact*,—viz., whether the facts in the declaration, which the traverse denies, be true. A question being thus raised, or, in other words, the

(b) See the declaration, *supra*, p. 118.

parties having arrived at a specific point or matter, affirmed on the one side and denied on the other, the defendant (as the party traversing) is, conformably to the ancient practice, (c) in general obliged to offer or refer this question to some *mode of trial*; and does this by annexing to the traverse an appropriate formula, proposing either a trial by the *country* (i. e., by a jury),—as in the example, page 147, or such other method of decision as by law belongs to the particular point. If this be accepted by his adversary, the parties are then (conformably to the language of the ancient pleading) (d) said to be *at issue*; and the question itself is called the *issue*. Consequently a party who thus traverses, annexing such formula, is said to *tender issue*; and the issue so tendered is called an issue *in fact*. Thus, in the example at page 147, the defendant, by his plea, tenders an issue in fact on the want of repair.¹

§ 75. *Demurrer*.—If it be next supposed that, instead of traversing, the defendant chooses to *demur*, it is obvious that a question is in this case also raised between the parties; and it is a question of *law*, viz., whether the declaration be sufficient in point of law to maintain the action. The defendant, therefore, as the party demurring, by analogy to the mode observed with respect to an issue in fact, uses a formula, referring that question to the proper mode of decision, viz., *the judgment of the court*, as in the example, page 135; and as upon a traverse, he tenders an issue in fact, so he is said in this case to tender an issue *in law*. Thus, in the same example, the defendant, by his demurrer, tenders an issue in law on the sufficiency of the declaration. And here it is to be observed that while upon a traverse a party is in general obliged to *tender issue*, upon a demurrer he always necessarily does so; for the only known form of a demurrer contains an appeal to the judgment of the court; but, on the other hand, as will appear in a subsequent part of the work, a party may sometimes traverse or deny, without offering any mode of trial.

The issue, whether in fact or law, being thus *tendered*, it is

(c) *Vide supra*, p. 102.

(d) *Vide supra*, p. 102.

¹ All rights of action and all special defenses result from matter of fact and matter of law combined. Gould's Pl., ch. 1, sec. 4; 3 Cooley's Black. (3d ed.) 313-15.

necessary, before the issue is complete, that it be *accepted*. And this subject shall be considered, first, as it respects the issue in *law*.

§ 76. *An issue*.— The tender of the issue in *law* is *necessarily* accepted by the plaintiff; for he has no ground of objecting either to the *question itself*, or the proposed *mode of decision*.¹ A question on the legal sufficiency of the declaration he cannot, of course, without abandoning his own form of proceeding, decline; and with respect to the mode of decision, viz., the judgment of the court, there is, in matters of law, no alternative method. He is therefore *obliged to accept*, or *join* in the issue at law; and does so by a set form of words called *joinder in demurrer*, of which the following is an example:

JOINDER IN DEMURRER.

Upon the demurrer, p. 185.

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

A. B. }
v. }
C. D. }

And the said A. B. says that the said declaration and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law for him, the said A. B., to have and maintain his aforesaid action against him, the said C. D. And the said A. B. is ready to verify and prove the same as the court shall direct and award. Wherefore, inasmuch as the said C. D. hath not answered the said declaration, nor hitherto in any manner denied the same, the said A. B. prays judgment, and his debt aforesaid, together with his damages by him sustained, by reason of the detention thereof, to be adjudged to him.

But the tender of the *issue in fact* is *not* necessarily accepted by the plaintiff; for, first, he may consider the *traverse itself* as insufficient in law. It will be recollected that by the traverse the defendant may deny either the *whole* or a *part* of the declaration; and, in the latter case, the traverse may, in the opinion of the plaintiff, be so framed as to involve a *part immaterial* or *insufficient to decide the action*.² Again, he may

¹ *Brown v. Key & Jones*, 10 G. & J.

² *Hopkins v. Medley*, 97 Ill. 403.

consider the traverse as *defective in point of form*, and object to its sufficiency in law on that ground. So, in his opinion, the *mode of trial proposed* may, in point of law, be inapplicable to the particular kind of issue. On such grounds, therefore, he has an option to *demur* to the traverse as insufficient in law. The effect of this demurrer, however, would only be to postpone the acceptance of issue by a single stage; for by the demurrer he tenders an issue in law; and his adversary, according to the principle already laid down, (e) would be obliged to join in demurrer, that is, to accept the issue in law in the next pleading. On the other hand, supposing a demurrer not to be adopted, the alternative course will be to accept the tendered issue of fact, and also the mode of trial which the traverse proposes; and this is done (in case of trial by jury) by a set form of words, called a *joinder in issue* or a *similiter*; in the following form:¹

JOINDER IN ISSUE,

OR,

SIMILITER.

Upon the traverse, in p. 146.

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

A. B. }
v. }
C. D. }

And the said A. B., as to the plea of the said C. D. above pleaded, and whereof he has put himself upon the country, doth the like.

(e) *Supra*, p. 149.

¹ A trial without an issue is a nullity. *Hubler v. Pullen*, 9 Ind. 273, 68 Am. Dec. 620; *Israel v. Reynolds*, 11 Ill. 218; *Reynolds v. Stockton*, 140 U. S. 254; *Munday v. Vail*, 84 N. J. L. 418. See these cases, *Hughes, Tech. Law*. But the formal joinder in issue may be waived and is cured by verdict. *Hazen v. Lundy*, 83 Ill. 241; *Gillispie v. Smith*, 29 Ill. 476. Such an objection after verdict is frivolous. *Id.* And though defective in form will be held good. *Everett v. DeGroff*, 1 Cow. 218; *Sayer v. Pocock*, Cowp. 407; *Shaw v. Redmond*, 11 S. & R. 277; *Whiting v. Cochran*, 9 Mass. 533; *Babcock v. Huntington*, 2 Day, 392.

The issue in law or fact being thus tendered, and accepted on the other side, the parties are *at issue*; and the pleading is at an end.

Hitherto it has been supposed that the defendant either *pleads in bar, by way of traverse*, or *demurs* to the declaration; but we will now suppose him to plead either one of the kinds of *dilatory plea*, or a *plea in bar, by way of confession and avoidance*. In either case the plaintiff has the option of *demurring* to the plea,—as being, in substance or form, an insufficient answer, in point of *law*, to the declaration,—or of *pleading* to it by way of *traverse*, or by way of *confession and avoidance*¹ of its allegations. Such *pleading* (*f*) on the part of the plaintiff is called *the replication*.²

If the replication be by way of *traverse*, it is in general necessary (as in the case of the plea) that it should *tender issue*. So, if the plaintiff *demur*, an issue in law is necessarily tendered; and in either case the result is a joinder in issue, upon the same principles as above explained with respect to the plea. But if the replication be in *confession and avoidance*, the defendant may then, in his turn, either *demur*, or, by a *pleading, traverse*, or *confess and avoid*, its allegations. If such pleading take place it is called *the rejoinder*.

In the same manner, and subject to the same law of proceeding, viz., that of *demurring*, or *traversing*, or pleading in *confession and avoidance*, is conducted all the subsequent altercation to which the nature of the case may lead; and the order and denominations of the alternate *allegations of fact* or *pleadings* throughout the whole series are as follows: *Declaration, plea, replication, rejoinder, surrejoinder, rebutter* and *surrebutter*. After the surrebutter the pleadings have no distinctive names; for beyond that stage they are very seldom found to extend. (*g*)

To whatever length of series the pleadings may happen to lead, it is obvious that, by adherence to the plan here de-

(*f*) See Appendix, note (27).

(*g*) See Appendix, note (28).

¹ Phillips v. Harris, 8 J. J. Marsh. 73. 122. Going to trial without disposing of a demurrer is a waiver. Williams

² Replication waives demurrer. v. Baker, 67 Ill. 288. Warner's Ex'rs v. Bledsoe, 4 Dana,

scribed, one of the parties must, at some period of the process, more or less remote, be brought either to *demur* or to *traverse*; for, as no case can involve an inexhaustible store of new relevant matter, there must be somewhere a limit to pleading in the way of *confession and avoidance*. Examples have already been given of the demurrer and traverse occurring at the *second* stage of the pleading, viz., in the plea: in those which here follow, they are not produced till after a longer series.

Let the plaintiff be supposed to declare in *assumpsit*, as in page 120, and the defendant to plead in abatement (for example, the non-joinder of a joint contractor, as in page 144). The plaintiff may then be supposed to *reply* thus:

REPLICATION.

By way of Traverse.

Upon the plea, p. 144.

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

A. B. }
v. }
C. D. }

And the said A. B. says that his said writ and declaration, by reason of anything in the said plea alleged, ought not to be quashed, because he says that the said promises and undertakings were made by the said C. D. alone, in manner and form as the said A. B. hath above complained; and not by the said C. D. jointly with the said G. H., in manner and form as the said C. D. hath above, in his said plea, alleged. And this the said A. B. prays may be inquired of by the country.

Again, let the plaintiff be supposed to declare in covenant on an indenture of lease (as in page 115), and the defendant to plead in bar, by way of confession and avoidance (for example, a release, as in page 147); the plaintiff may then be supposed to reply thus:

REPLICATION.

By way of Confession and Avoidance.

Upon the plea, p. 147.

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.A. B. }
v. }
C. D. }

And the said A. B. says that by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said C. D., because he says that he, the said A. B., at the time of the making of the said supposed deed of release, was unlawfully imprisoned and detained in prison by the said C. D. until, by force and duress of that imprisonment, he, the said A. B., made the said supposed deed of release as in the said plea mentioned. And this the said A. B. is ready to verify. Wherefore he prays judgment and his damages by him sustained by reason of the said breach of covenant to be adjudged to him. (*h*)

To this the defendant may be supposed to *rejoin* as follows:

REJOINDER.

By way of Traverse.

Upon the above replication.

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.C. D. }
ats }
A. B. }

And the said C. D. saith that by reason of anything in the said replication alleged, the said A. B. ought to have or maintain his aforesaid action against him, the said C. D., because, he says, that the said A. B. freely and voluntarily made the said deed of release, and not by force and duress of imprisonment, in manner and form as by the said replication alleged. And of this the said C. D. puts himself upon the country. (*i*)

In these examples the parties ultimately arrive at a *traverse*; but it may happen that in any part of the series a *demurrer* instead of a traverse may take place. Thus, if the

(*h*) See a similar replication, § Richardson's K. B., p. 60.(*i*) See a similar rejoinder, § Richardson's K. B., p. 60.

defendant in the last example choose to dispute the sufficiency in point of law of the substance of the matter in the replication, he would, instead of a rejoinder, *demur* to the replication, thus:

DEMURRER.

To the replication, in p. 153.

In the King's Bench,

C. D. } ats A. B. }	Term, in the — year of the reign of King George the Fourth.
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And the said C. D. says that the said replication of the said A. B. to the said plea of him, the said C. D., and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said A. B. to have or maintain his aforesaid action against the said C. D.; and that he, the said C. D., is not bound by the law of the land to answer the same. And this the said C. D. is ready to verify. Wherefore, for want of a sufficient replication in this behalf, the said C. D. prays judgment if the said A. B. ought to have or maintain his aforesaid action against him.

As the parties will at length arrive at demurrer or traverse, so, whenever a *traverse* is at length produced, it comprises, in general, a *tender of issue* (as in the above examples); and a *demurrer* necessarily involves a tender of issue, the consequence of which is, in either case, a joinder in issue, exactly upon the same principle as above explained, with respect to the plea; so that the parties arrive *at issue*, after a longer series of pleading, precisely in the same manner as when the process terminates at the earliest possible stage. Such is, in a general view, the nature of the process of pleading, and the manner of coming to issue. (*k*)

§ 77. **Pleas puis darreign continuance.**—The pleading has been hitherto supposed to take its direct and simple course. There are, however, some *pleas* and *incidents* of occasional occurrence, by which its progress is sometimes broken or varied; and of these it will now be proper to give some account.

The *pleas* here referred to are called *pleas puis darreign continuance*.

(*k*) See Appendix, note (38).

It will be remembered (*D*) that under the ancient law there were *continuances*, i. e., adjournments of the proceedings for certain purposes, from one day or one term to another; and that in such cases there was an entry made on the record expressing the ground of the adjournment, and appointing the parties to re-appear at the given day. In the intervals between such continuances and the day appointed, the parties were of course *out of court*, and consequently not in a situation to plead. But it sometimes happened that after a *plea* had been pleaded, and while the parties were out of court, in consequence of such a continuance, a new matter of defense arose, which did not exist, and which the defendant had consequently no opportunity to plead, *before* the last continuance. This new defense he was therefore entitled at the day given for his re-appearance to plead as a matter that had happened after the last continuance—(*puis darreign continuance—post ultimam continuationem*). In the same cases as occasioned a continuance in the ancient law, but in no other, a continuance still takes place. At the time, indeed, when the pleadings are filed and delivered, no record exists, and there is therefore no entry at that time made on record of the award of a continuance; but the parties are from the day when, by the ancient practice, a continuance would have been entered, supposed to be *out of court*, and the pleading is suspended till the day arrives to which, by the ancient practice, the continuance would extend. And that day the defendant is entitled, if any new matter of defense has arisen in the interval, to plead it according to the ancient plan, *puis darreign continuance*.¹ The following is an example of the form:

(D) *Supra*, p. 103.

¹ Fitzpatrick v. Fitzpatrick, 6 R. I. 64; Rowell v. Hayden, 40 Me. 582; Hendrickson v. Hutchinson, 29 N. J. L. 180; Longworth v. Flagg, 10 Ohio St. 300; Mount v. Scholes, 120 Ill. 394; Yeaton v. Lynn, 30 U. S. 224; Thompson v. United States, 108 id. 480; Feagin v. Pearson, 42 Ala. 332. One sued on a bond may plead *puis darreign continuance* that since the institution of the suit he has paid

the whole amount of his bond to satisfy judgments in other suits. Leggett v. Humphreys, 62 U. S. 66. See Mount v. Scholes, 120 Ill. 394. The purpose of the plea is to protect the defendant from liability for double payment. Smith v. Carroll, 17 R. I. 125, 12 L. R. A. 301.

A release since the last continuance may be shown by this plea (Wade v. Emerson, 17 Mo. 267; Wis-

PLEA PUIS DARREIGN CONTINUANCE.

In the King's Bench.

— next after — in — term, in the —
year of the reign of King George the Fourth.

C. D. }
ats
A. B. }

And now at this day, that is to say, on —, next after — in this same term, until which day the plea aforesaid was last continued, come as well the said A. B. as the said C. D., by their respective attorneys aforesaid. And the said C. D. says that the said A. B. ought not farther to have or maintain his aforesaid action against him; because, he says, that after the last continuance of this cause, that is to say, —, next after —, in this same term, from which day this cause was last continued, and before this day, to wit, on the — day of —, in the year of our Lord —, at — aforesaid, in the county aforesaid, the said A. B., by his certain deed of release, sealed with his seal [the release may be here stated, as *supra*, p. 147]. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought farther to have or maintain his aforesaid action against him, etc. (*m*)

A plea *puis darreign continuance* is always pleaded by way of substitution for the former plea, on which no proceeding is afterward had.¹ It may be either in bar or abatement, (*n*) and is followed, like other pleas, by a replication and other pleadings till issue is attained upon it.²

§ 78. Demand of view.— Of the *incidents* of occasional occurrence, by which the progress of the pleading is sometimes varied, some of the principal shall here be noticed; and first,

(*m*) 2 Chitty, 676; 1 Arch. 323.

(*n*) Com. Dig., Abatement, I, 24.

heart v. Legro, 33 N. H. 177), and payment. Herod v. Snyder, 61 Ind. 453; Bowne v. Joy, 9 Johns. 221.

Extreme certainty and strictness are required in framing these pleas, and the plea must specify clearly the date of the last continuance. Henry v. Porter, 29 Ala. 619; Vicary v. Moore, 2 Watts, 451, 27 Am. Dec. 223; Augusta v. Moulton, 75 Me. 551.

¹ A plea *puis darreign continuance* supersedes all other pleas and de-

fenses in the cause, and the parties proceed to settle the pleadings *de novo* just as though no plea or pleas had theretofore been filed. Mount v. Scholes, 120 Ill. 394. See Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410; Lincoln v. Thrall, 26 Vt. 304; Wallace v. McConnell, 38 U. S. 136; Yeaton v. Lynn, 30 id. 224.

² See Cummings v. Smith, 50 Me. 568, 79 Am. Dec. 623.

1. The demand of view.

In most real and mixed actions, in order to ascertain the identity of the land claimed with that in the tenant's possession, the tenant is allowed, after the demandant has counted, to *demand a view*¹ of the land in question; or, if the subject of claim be a rent, a right of advowson, a right of common, or the like, a view of the land out of which it issues. (o) This, however, is confined to real or mixed actions. For in actions personal the view does not lie. (p) In the action of dower, *unde nihil habet*, it has been much questioned whether the view be demandable or not; (q) and there are other real and mixed actions in which it is not allowed.

The view being granted, the course of proceeding is to issue a writ commanding the sheriff to cause the defendant to have view of the land. It being the interest of the demandant to expedite the proceedings, the duty of suing out the writ lies upon *him*, and not upon the tenant; (r) and when, in obedience to its exigency, the sheriff causes view to be made, the demandant is to show to the tenant, in all ways possible, the thing in demand, with its metes and bounds. (s)

On the return of the writ into the court, the demandant must count *de novo*; that is, declare again; (t) and the pleading proceeds to issue. (u)

(o) Vin. Ab., View; Com., Dig., View; Booth, 37; 2 Saund. 45, b; 1 Reeves, 435.

(p) 1 Reeves, 435.

(q) The better opinion seems to be that it is not demandable. 2 Saund. 44, n. 4.

(r) Booth, 40.

(s) 1 Reeves, 436.

(t) Com. Dig., Pleader, 2 Y. 3; Booth, *ubi supra*.

(u) Both this proceeding of *demanding a view* and the *voucher to warranty*, afterwards mentioned, are, in the present rarity of real actions, unknown in practice. They seem, however, to deserve notice as illustrating the principles of pleading.

¹ The reason for granting view is, Boardman v. Westchester Fire Ins. Co., 54 Wis. 364; Stockwell v. C. C. & D. R. Co., 43 Iowa, 470; Bedell v. Berkey, 76 Mich. 435; Friedrich v. Flieth, 64 Wis. 184. In eminent domain cases. Parks v. Boston, 15 Pick. 209; Galena & S. W. Ry. v. Haslam, 73 Ill. 494. See, also, Close v. Samm, 27 Iowa, 507, 92 Am. Dec. 842, note. The practice of viewing the premises in actions for overflowing lands

§ 79. Voucher of warranty.—

2. Another incident that deserves notice is *voucher to warranty*.¹

A warranty is a covenant real annexed to lands and tenements whereby a man is bound to defend such lands and tenements for another person; and, in case of eviction by title paramount, to give him lands of equal value. (x) Voucher to warranty (*vocatio ad warrantizandum*) is the calling of such warrantor into court by the party warranted (when tenant in a real action brought for recovery of such lands) to defend the suit for him; (y) and the time of such voucher is after the demandant has counted. It lies in most real and mixed actions, but not in personal. (z)

Where the voucher has been made and allowed by the court, the vouchee either voluntarily appears, or there issues a judicial writ (called a summons *ad warrantizandum*) commanding the sheriff to summon him.

When he either voluntarily or in obedience to this writ appears and offers to warrant the land to the tenant, it is called *entering into the warranty*; after which he is considered as tenant in the action in the place of the original tenant. The demandant then counts against him *de novo*, (a) the vouchee pleads to the new count, and the cause proceeds to issue.

(x) Co. Litt. 365; Com. Dig., Warranty, A.

(y) Co. Litt. 101 b; Com. Dig., Voucher, A. 1; Booth, 43; 2 Saund. 32, n. 1.

(z) Com. Dig., Voucher, A. 1; 2 Saund. 32, n. 1.

(a) 2 Inst. 241a; 2 Saund. 32, n. 1; Booth, 46.

or nuisances, or condemnation, is not unusual, and is often regulated by statutes. A valuable article is found in 26 Cent. Law J. 436. The following is a synopsis:

(a) *At common law*.—It was not allowed in personal actions (Jacobs' Dict., tit. View); but by section 8 of 4 Ann. ch. 16, extended to waste, trespass, ejectment, etc. In 1757 the courts held that it was within the discretion of the court. 1 Burrows, 253. See Flint v. Hill, 11 East, 184; Stoner v. Menham, 2 Exch. R. 382.

(b) *In America*.—In states where the statute of Anne not in force, view cannot be granted against consent. Dowd v. Guthrie, 13 Brad. 658.

The rule as to discretion of the court is quite generally followed. Clayton v. Chi. & D. Ry., 67 Iowa, 238; Richmond v. Atkinson, 58 Mich. 413; Pick v. Rubicon Co., 27 Wis. 483; Leidheim v. Meyers, 95 Mich. 586.

¹ 3 Cooley's Black. (3d ed.) 800.

§ 80. Oyer and profert.— See § 226 for example.

3. A party in pleading may also have occasion to make *demand of oyer*. (b)¹

Where either party alleges any deed, he is in general obliged, by a rule of pleading that will be afterwards considered in its proper place, to make *profert* of such deed; that is, to produce it in court simultaneously with the pleading in which it is alleged. This, in the days of oral pleading, was of course an actual production in court. Since then, it consists of a formal allegation that he shows the deed in court; it being, in fact, retained in his own custody. An example of this allegation will be found in the declaration of debt on a bond, as above given. (c)

Where profert is thus made by one of the parties, the other, before he pleads in answer, is entitled to *demand oyer*; that is, to *hear it read*. For it is to be observed, that the forms of pleading do not, in general, require that the whole of any instrument which there is occasion to allege should be set forth. So much only is stated as is material to the purpose; of which the example last cited will also serve for illustration. The other party, however, may reasonably desire to hear the whole; and this either for the purpose of enabling him to ascertain the genuineness of the alleged deed, or of founding on some part of its contents, not set forth by the adverse pleader, some matter of answer. He is therefore allowed this privilege, of hearing the deed read *verbatim*.

When the profert was actually made in *open court*, the demand of oyer, and the oyer given upon it, took place in the same manner; and the course was, that on demand by one of

(b) See the whole law and practice of *oyer* stated, 1 Sellon, 261; 1 Tidd, 518 (4th ed.); 1 Chitty, 414; 1 Arch. 164; 2 Arch. Pract. 194, 196.

(c) *Supra*, p. 114.

¹ Oyer does not include or allow inspection of any document except the one upon which suit is brought. See *Inspection*, *post*; 2 Arch. Pr. 13, p. 1019; *Chetwind v. Marnell*, 1 B. & P. 271. Profert is required and oyer ordered only of documents of which the party has custody. *Judge of Probate v. Merrill*, 6 N. H. 256.

deed a part of the pleading and record. *Suydam v. Williamson*, 20 How. 441; *Rantin v. Robertson*, 2 Strobb. (S. C.) 366. A denial of oyer when it should be granted is ground for a writ of error. *Chitty Pl.* (16th Am. ed. by Perkins), *446; *Osborn v. Reed*, 1 Black. 126; *Judge of Probate v. Merrill*, 6 N. H. 256.

The effect of oyer is to make the

Statute re-
gulating
oyer
made
in
court

the pleaders the deed was read aloud by the pleader on the other side. (d) By the present practice, the attorney for the party by whom it is demanded, before he answers the pleading in which the profert is made, sends a note to the attorney on the other side, containing a demand of oyer; on which the latter is bound to carry to him the deed, and deliver to him a copy of it, if required, and this is considered as oyer, or an actual reading of the deed in court. (e)¹

Oyer is demandable in all actions: real, personal, and mixed.

Oyer was formerly demandable not only of *deeds*, but of *records*² alleged in pleading, and (as has been before stated in this work) of the *original writ* also; (f) but by the present practice it is not now granted either of a record or an original writ; (g)³ and can be had only in the cases of *deeds*, *probates* and *letters of administration*, etc., of which profert is made on the other side: of *private writings not under seal*, oyer has never been demandable.⁴

In all cases where profert is necessary and where it is also

(d) *Semb.* Com. Dig., Pleader, p. 1; *Simpson v. Garside*, Lutw. 1644. In *Jevons v. Harridge*, 1 Sid. 808, the reading of the deed is said to be the act of the court; but the true doctrine seems to be that laid down in *Lutwyche*. The rule seems to have been that *writs* were read by the court, but *deeds* by the pleader. *Vide* Com. Dig., Pleader, p. 1.

(e) *Page v. Divine*, 2 T. R. 40; 1 Tidd, 518 (4th ed.); 1 Sel. 264.

(f) *Vide supra*, p. 144.

(g) As to the Original Writ, *vide supra*, p. 145. As to records, *vide King v. Amery*, 1 T. R. 150.

¹ Setting out an instrument in full has been held sufficient oyer. *Regents of U. of M. v. Detroit Young Men's Ass'n*, 12 Mich. 138. But the opposite party has the right to insist upon the production of the original, and the refusal of the court to so order is error. *Judge of Probate v. Merrill*, 6 N. H. 256; *Smith v. Woodward*, 4 East, 585; *Rand v. Rand*, 4 N. H. 278.

² See *Wood v. Griffith*, Ld. Raym. 83.

³ *Ruggles v. Adams*, 3 A. K. Marsh. 429; *Gatton v. Dimmett*, 27 Ill. 400; *Regents of U. of M. v. Detroit Ass'n*, 12 Mich. 138; 1 Chitty Pl. (16th Am. ed. Perkins), *446.

⁴ When the declaration counts upon an instrument not under seal, the

practice is for the defendant to obtain an order for the inspection of the document, which compels the plaintiff to produce it. *Whittaker v. Izod*, 2 Taunt. 114; *Whitter v. Cazelet*, 2 Term, 683; *Blakely v. Porter*, 1 Taunt. 386. See on inspection, 2 Archbold's Practice (1840), 1023. The practice is analogous to the idea of oyer, and discovery in equity, and the code practice is analogous to this. Since the abolition of oyer in England by C. L. P. Act, 1852, inspection is the remedy. *Williams' Notes*, 1 Saund. R. 9.

Profert is unnecessary when the deed is stated only for inducement. *Banfield v. Leigh*, 8 T. R. 571; *Jevons v. Harridge*, 1 Saund. 9a.

in fact made, the opposite party has a right if, he pleases, to demand oyer; but, if it be unnecessarily made, this does not entitle to oyer; and so if profert be omitted when it ought to have been made, the adversary cannot have oyer, but must demur. (A)

When a deed is pleaded with profert, it is supposed to *remain in court* during all the term in which it is pleaded, but no longer, unless the opposite party during that term plead in denial of the deed; in which case it is supposed to remain in court till the action is determined. Hence it is a rule that oyer cannot be demanded *in a subsequent term to that in which profert is made.* (i)

A party having a right to demand oyer is yet not obliged, in all cases, to exercise that right; (k) nor is he obliged, in all cases, after demanding it, to notice it in the pleading that he afterwards files or delivers. (l) Sometimes, however, he is obliged to do both, viz., where he has occasion to found his answer upon any matter contained in the deed of which profert is made, and not set forth by his adversary. In these cases, the only admissible method of making such matter appear to the court is to demand oyer, and, from the copy given, set forth the whole deed *verbatim* in his pleading. (m) The following is an example of the manner in which the demand of oyer is thus entered and the deed set forth in the pleading:

PLEA IN BAR.

To debt on bond. (n)

In the King's Bench.

— Term, in the — year of the reign
of King George the Fourth.

C. D. }
ats
A. B. }

And the said C. D., by — —, his attorney, comes and defends the wrong and injury when, etc., and craves oyer of

(A) Arch. 164.

(i) 1 Tidd, 520; 1 Chitty, 418.

(k) Arch. 164-b.

(l) 1 Tidd, 522.

(m) Com. Dig., Pleader, 2 V. 4; Arlington v. Merricke, 2 Saund. 410, n. 2; Jevens v. Harridge, 1 Saund. 2, b, n. 1; Stibbs v. Clough, 1 Str. 227; Fort. 354; Colton v. Goodridge, 2 Black. 1108.

(n) See the declaration, *supra*, p. 114.

the said writing obligatory, and it is read to him, etc. He also craves oyer of the condition of the said writing obligatory, and it is read to him in these words: "Whereas" (here the condition of the bond, which shall be supposed to be for payment of one hundred pounds on a certain day, is set forth *verbatim*); which, being read and heard, the said C. D. says that the said A. B. ought not to have or maintain his aforesaid action against him, because he says that he, the said C. D., on the said — day of —, in the year aforesaid, in the said writing obligatory mentioned, paid to the said A. B. the said sum of one hundred pounds in the said condition mentioned, together with all interest then due thereon, according to the form and effect of the said condition, to wit, at — aforesaid, in the county aforesaid. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action against him. (o)

§ 81. Impar lance.—

4. The last of these incidents that need be mentioned is the *prayer of an impar lance*.

By the ancient practice, if a party found himself unprepared to answer the last pleading of his adversary immediately, his course was to pray the court to allow him a farther day for that purpose, which was accordingly granted by the court to any day that, in their discretion, they might award, either in the same or the next succeeding term. (p) The party was, in this case, said to pray, and the court to grant, an *impar lance* (*interlocutio*, or *interloquela*); a term derived from the supposition that in this interval the parties might *talk together* and amicably settle their controversy. (q)¹

An impar lance when granted was one of the cases of *continuance*; of which general doctrine some explanation has been before given. (r)

It was grantable in almost all actions: real, personal, and mixed. (s)

The prayer of impar lance, when made by the defendant prior to his plea, was either *general* or *special*. The first was simply a prayer for leave to imparl. Of such *general* imparl-

(o) 2 Chitty, 478.

(p) Booth, 36; Com. Dig., Pleader, D. 1.

(q) 8 Bl. Com. 299.

(r) *Supra*, p. 103.

(s) Com. Dig., Pleader, D. 2.

¹ See *McCormick v. Rusch*, 15 Ia. 127.

ance it was a consequence that the defendant was afterwards precluded from certain proceedings of a dilatory tendency, which might before have been competent to him. Thus he could not, after a general imparlance, demand *oyer*, (t) nor (according to some authorities) a *view*, (u) nor could he plead a plea *to the jurisdiction* or *in abatement*. (x) Accordingly, if he wished to preserve his right to these advantages, he varied the form of his prayer, and made it with a reservation of such right. If his object was to preserve the right of pleading in *abatement*, he prayed what is called a *special* imparlance. The nature of the imparlance, general and special, will more fully appear by examples of the style in which this kind of continuance was entered on the record.

ENTRY OF GENERAL IMPARLANOE.

To the declaration.

(In the King's Bench, by original.)

[*After the entry of the declaration the record proceeds thus:*]

And the said C. D., by — — —, his attorney, comes and defends the wrong and injury when, etc., and prays a day thereupon to imparl to the said declaration of the said A. B., and it is granted to him, etc. And upon this a day is given to the parties aforesaid, before our lord the king, until the Morrow of All Souls, wheresoever, etc., that is to say, for the said C. D. to imparl to the declaration aforesaid, and then to answer the same. (y)

ENTRY OF SPECIAL IMPARLANOE.

To the declaration.

(In the King's Bench, by original.)

[*After the entry of the declaration the record proceeds thus:*]

And the said C. D., in his proper person, comes, and, saving to himself all advantages and exceptions, as well to the writ as to the declaration aforesaid, prays leave to imparl thereunto here until, etc. And it is granted to him, etc. The same day is given to the said A. B. here, etc. (z)

(t) 2 Saund. b. n. 2.

(u) 2 Saund. 43, 2; Booth, 39.

(x) Com. Dig., Abatement, I, 20; 2 Saund. 2, n. 2.

(y) 2 Chitty, 406. See the form in common pleas, Booth, 36. In proceedings by *bill* in king's bench there was no formal entry of a prayer, but a short notice on the record *retrospectively* that an imparlance had been granted. Chitty, *id.*

(z) 2 Chitty, 407. See the form in proceeding by *bill* in king's bench. Lib. Plac. 2, pl. 15; 2 Saund. 2, n. 2.

The latter form would entitle the party to plead in *abatement* afterwards, but not to the *jurisdiction*; and therefore, if he wished to preserve the power of doing this also, he resorted to another kind of special imparlance, differing from the former only in this, that it contained a saving of "*all advantages and exceptions whatsoever*." (a) This is called in the books a *general special imparlance*; and it would seem that the effect of an imparlance of this description is to preserve the power, not only of pleading all dilatory pleas, but of demanding *oyer* and a *view*. (b)

The law and practice on the subject of imparlance still remains in the same state as here described, subject to the following remarks:

By the practice of the present day, a party is either obliged to answer the last antecedent pleading in the same term, or is entitled, *as of course*, to an imparlance to the next term, according to the period of the existing term, at which it becomes his turn to plead, and the course of the previous proceedings. The rules on this subject are too various, and merely practical, to be here stated. An imparlance, when not grantable *as of course*, may yet be obtained upon application, for some particular cause, at the *discretion of the court*.

When an imparlance is grantable *as of course*, and a general imparlance will suffice, no actual prayer or application for it is now made, but the party entitled takes the imparlance for himself, by suspending his pleading till the next term. And on a general imparlance, no notice of the proceeding is usually taken in the pleadings filed and delivered between the parties. (c) But if the defendant, being entitled as of course to an imparlance, wishes, at the same time, to preserve his right of pleading dilatory pleas and taking other advantages, and consequently to obtain a special or general special imparlance, he must make an actual application to the court (d) for this purpose; and where a special or general special imparlance is thus obtained, the defendant makes an entry of it in his plea

(a) 2 Saund. 2, n. 2.

(b) *Vide* 1 Chitty, 418.

(c) 1 Chitty, 421.

(d) But the special imparlance in the common pleas may be granted by the prothonotary. 2 Saund. 2, note 2.

filed or delivered. (e) This is done exactly in the form of the ancient entry on record; (f) and it stands as a commencement to his plea.

These and other incidents of a similar kind may occur in pleading. If they take their course without opposition, they do not, as we have seen, long interrupt the main series of the allegations. But, with respect to most of them, the opposite party has a right, if he pleases, to oppose the prayer made on the other side; and for this purpose he was entitled, in the ancient practice of pleading, to *demur* or *plead* to it, as if it were a statement of fact made in the direct course of the pleading. Thus, if a party demanded oyer in a case where, upon the face of the pleading, his adversary conceived it to be not demandable, the latter might *demur*; (g) or, if he had any matter of fact to allege as a ground why the oyer could not be demanded, he might *plead* such matter. (h) If he pleaded, the allegation was called a *counter-plea to the oyer*. So the demandant might have occasion in the same manner to *counterplead* the *voucher*, or *counterplead* the *view*; all pleadings of this incidental kind, diverging from the main series of the allegations, being termed *counter-pleas*. (i) And in the latter instances, as well as upon oyer, it would seem there might be demurrer instead of counterplea, if the objection appeared on the face of the proceedings. Again, on the counter-plea, in all these cases, there might happen to be a replication, and other subsequent pleadings, and so the parties might come to *issue* in law, or in fact, on this collateral subject, in the same manner as upon the principal matters in controversy. It is to be observed, however, that these collateral or incidental pleadings, though according to the principle of the science they may occur, have now fallen into complete disuse in point of practice. (k)

§ 82. **Making up the issue.**—Supposing the cause to be *at issue*, the next proceeding is to make a transcript upon paper of the whole pleadings that have been filed or delivered be-

(e) 2 Chitty, 423; 2 Saund. 2, note 2.

(f) As in the example, *supra*, p. 163.

(g) 1 Saund. 9 b, n. 1.

(h) *Id.*

(i) In Reg. Plac. 118, *counter-plea* is defined to be "a kind of replication."

(k) See an example of an issue upon counter-plea to the voucher in Formedon, Bro. Ent. 174.

tween the parties. This transcript, when the issue joined is an issue at law, is called the *demurrer-book*; when an issue in fact, it is called in the king's bench, in some cases, the *issue*; in others, the *paper-book*; and in the common pleas, *the issue*. It contains not only the pleadings, but also entries, according to the ancient forms used in recording, (*l*) of the appearance of the parties, the continuances, and other acts supposed to be done in court, up to the period of issue joined, even though such entries have not formed part of the pleadings as filed and delivered; and it concludes with an entry of an award by the court, of the mode of decision tendered and accepted by the pleadings. The making of this transcript, upon an issue in law, is called *making up the demurrer-book*; upon an issue in fact, *making up the issue* or *paper-book*. The demurrer-book, issue or paper-book, when *made up*, is delivered to the defendant's attorney, who, if it contains what he admits to be a correct transcript, returns it unaltered; but if it varies from the pleadings that were filed or delivered, he makes application to the court to have it set right. (*m*)¹ Before dismissing the subject of this transcript, it will be proper to notice the following point of practice with respect to the manner in which the demurrer-book, issue or paper-book is made up and delivered. Whenever the *defendant* demurs or traverses with a *conclusion to the country* (that is, with an offer of trial *by jury*), instead of returning a regular joinder in demurrer or *similiter* on the part of the plaintiff before making up the demurrer-book, issue or paper-book, in the manner formerly described, (*n*) the usual course, in a view to expedite the proceedings, is to make up and deliver to the defendant the demurrer-book, issue or paper-book at once; inserting in it, however, a joinder in demurrer or a *similiter* for the plaintiff. (*o*) And this, in the case of an issue in fact, is done, not in the full and regular form of a joinder in issue (as formerly given), (*p*) but in the following abbreviated style, viz.: "And the said A. B. does the like." Again, whenever the *plaintiff* demurs or traverses, concluding to the

(*l*) *Vide supra*, p. 108.

(*m*) *Shepley v. Marsh*, Str. 1181.

(*n*) *Supra*, pp. 149, 150.

(*o*) 1 Arch. Pract. 181.

(*p*) *Supra*, p. 150.

¹ See *Thynne v. Woodman*, 2 Tyrw. 495.

country, the demurrer-book, issue or paper-book is, in like manner, made up at once and delivered to the defendant, with a joinder in demurrer or *similiter* inserted for *him*, the *similiter* being in the same abbreviated form: "And the said C. D. does the like." The defendant, however, having an option (as above explained) (*q*) with respect to the joinder in issue, is of course entitled, if he pleases, to strike out the *similiter* and demur.

During the course of the pleading, if either party perceives any mistake to have been committed in the manner of his allegation, or if, after issue joined on demurrer for matter of form, he should think the issue likely to be decided against him, he ought to apply without delay for leave to *amend*. It is proper, therefore, now to take some notice of the law of *amendment*.

§ 83. Of amendments.—Under the ancient system the parties were allowed to correct and adjust their pleadings during the oral altercation, and were not held to the form of statement that they might first advance. (*r*) So at the present day, until the *judgment is signed* (*s*) in the manner to be afterwards mentioned, either party is, in general, at liberty to *amend* his pleading as at *common law*; the leave to do which is granted as of course, (*t*) upon proper and reasonable terms, including the payment of the costs of the application, and sometimes the whole costs of the cause up to that time.¹ And even after the judgment is signed, and up to the latest period of the action, amendment is, in most cases, allowable at the discretion of the court, under certain *statutes* passed for allowing amendments of the record; and in late times the

(*q*) *Supra*, p. 149.

(*r*) 2 Reeves, 349; Rush v. Seymour, 10 Mod. 88.

(*s*) 2 Arch. Pract. 231.

(*t*) Rush v. Seymour, 10 Mod. 88; 2 Tidd, 642, 4th ed. But not as of course in a *real action*. And, in general, the court will not allow an amendment in an action of that class. 1 Tidd, 644, 4th ed.; Dunsday v. Hughes, 3 Bos. & Pul. 453; Charlwood v. Morgan, 1 N. R. 64, 223; Hull v. Blake, 4 Taunt. 572.

¹ The proper practice is to present a proposed amendment when leave to file it is asked, but the court, in its discretion, may give leave to amend at a future time. McFarland v. Claypool, 128 Ill. 398; Ridgely Nat. Bank v. Fairbank, 54 Ill. App. 296. One

cannot amend so as to change cause of action entirely. Sears v. Mortgage Loan Co., 56 Mo. App. 122. Amendments may be made in pleadings by inserting jurisdictional facts. Mitchell v. Railroad Co., 82 Mo. 106.

judges have been much more liberal than formerly in the exercise of this discretion. Amendments are, however, always limited by due consideration of the rights of the opposite party; and where, by the amendment, he would be prejudiced or exposed to unreasonable delay, it is not allowed.¹

§ 84. *Entering the issue.*—To return to the main course of proceeding. The pleadings and issue being adjusted by the making up, delivery and return of the demurrer-book, issue or paper book, the next step is to *enter the issue on record*. It will be remembered that the pleadings are framed as if they were copied from a roll of the oral pleadings. Such a roll (as has been shown) (*u*) did, in the time of oral pleading, exist, and still exists in contemplation of law; but no roll is now actually prepared or record made till after issue joined and made up in manner above described. At that period, however, a record is drawn up on a parchment roll. This proceeding is called *entering the issue*, and the roll on which the entry is made is called *the issue roll*. The issue roll contains an entry of *the term* of which the demurrer-book, issue or paper book is entitled, and the *warrants of attorney* supposed to have been given by the parties at the commencement of the cause, authorizing their attorneys to appear for them, respectively; (*x*) and then proceeds with a transcript of the declaration and subsequent pleadings, continuances and award of the mode of decision, as contained in the demurrer-book, issue or paper-book. When drawn up it is filed in the proper office of the court. (*y*) Of the manner of thus entering the issue on record the following are examples:

(*u*) *Supra*. pp. 103, 104. *Et vide* Sel. Introd., lxiv.

(*x*) 2 Tidd, 670; Impey, C. P. 363; and *vide supra*, p. 104.

(*y*) 2 Tidd, 670, 671; 1 Sel. 335, 403. Such is the course of proceeding when strictly and formally pursued. But with respect to an issue *in fact* the statement is not quite practically true, it being the general practice not to complete the issue roll in that case by transcribing the whole of the proceedings into it, but to enter only what is called an *incipitur*, that is, the mere commencement or initial words of the issue or paper-book. Tidd, 671; Impey, C. P. 403. It did not seem worth while to embarrass the statement in the text by noticing this circumstance.

¹ Koch v. Roth, 150 Ill. 212. The that it is thought best to insert a note reform in amendments is so liberal to the author's note 33, App.

ENTRY OF ISSUE.

On Demurrer.

With an imparlance.

(In the King's Bench — by original.—

In an action of covenant.)

As yet of — Term, in the — year of
the reign of King George the Fourth.

Witness Sir Charles Abbott, Knight.

—, to wit, A. B. puts in his place E. F., his attorney,
against C. D., in a plea of breach of covenant.—, to wit, C. D. puts in his place G. H., his attorney, at
the suit of the said A. B., in the plea aforesaid.—, to wit, C. D. was summoned to answer (*as in the dec-*
laration, supra, p. 115).

And the said C. D., by — —, his attorney, comes and
defends the wrong and injury when, etc., and prays a day
thereupon to imparl to the said declaration of the said A. B.;
and it is granted to him, etc. And upon this a day is given
to the parties aforesaid, before our lord the king, until —,
wheresoever, etc., that is to say, for the said C. D. to im-
parl to the declaration aforesaid, and then to answer the same.
At which day, before our said lord the king at Westminster,
come the parties aforesaid, by their attorneys aforesaid; and
the said C. D. says that the said A. B. ought not to have or
maintain (etc., *as in the plea, supra, p. 147*).

And the said A. B. says that, by reason of anything in the
said plea alleged, he ought not to be barred (etc., *as in the*
replication, supra, p. 153).

And the said C. D. says that the said replication of the said
A. B. to the said plea of him, the said C. D., and the matters
therein contained, in manner and form as the same are above
pleaded and set forth, are not sufficient in law (etc., *as in the*
demurrer, supra, p. 154).

And the said A. B. says that the said replication and the
matters therein contained, in manner and form as the same
are above pleaded and set forth, are sufficient in law for him,
the said A. B., to have and maintain his aforesaid action
against the said C. D. And the said A. B. is ready to verify
and prove the same, as the court here shall direct and award.
Wherefore, inasmuch as the said C. D. hath not answered the
said replication, nor hitherto in any manner denied the same,
the said A. B. prays judgment, and his damages by him sus-
tained by reason of the said breach of covenant, to be ad-
judged to him. But because the court of our lord the king,
now here, are not yet advised (z) what judgment to give of

(z) This concluding part of the entry, beginning *But because, etc.*, is called an entry of
curia advisare vult, which were the words used when the record was in Latin. It is an
award of the mode of decision, viz.: that by the judgment of the court. This, as well as
the imparlance, is one of the kinds of continuance; as to which, *vide supra*, pp. 108, 162.

and upon the premises, a day is given to the parties aforesaid before our lord the king, on —, wheresoever, etc., to hear judgment thereon, for that the said court of our lord the king now here are not yet advised thereof. (a)

ENTRY OF ISSUE.

On an Issue in Fact to be tried by a Jury.

Without an imparlance.

(In the King's Bench — by original.—

In an action of covenant.)

As yet of — Term, in the — year of the reign of King George the Fourth. Witness, Sir Charles Abbott, Knight.

— to wit, A. B. puts in his place E. F., his attorney, against C. D., in a plea of breach of covenant.

— to wit, C. D. puts in his place G. H., his attorney, at the suit of the said A. B., in the plea aforesaid.

— to wit, C. D. was summoned to answer (*as in the declaration, supra*, p. 115).

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says (*as in the plea, supra*, p. 147).

And the said A. B. says that, by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said C. D., because he says (*as in the replication, supra*, p. 153).

And the said C. D. saith that, by reason of anything in the said replication alleged, the said A. B. ought not to have or maintain his aforesaid action against him, the said C. D., because he says (*as in the rejoinder, supra*, p. 153).

And the said A. B. does the like. (b) Therefore it is commanded to the sheriff (c) that he cause to come before our lord the king, on —, wheresoever our said lord the king shall then be in England, twelve, etc., by whom, etc., and who neither, etc., to recognize, etc., because as well, etc. The same day is given to the parties aforesaid, etc. (d)

The action being now brought to that stage at which the issue is recorded, the next subject for consideration is the manner in which the issue is *decided*.

(a) For the form of entering the issue, as above given, see Tidd's Appendix, chs. xxxi, xxxix; 1 Arch. Pract. 184.

(b) As to this abbreviated form of the *similiter*, see *supra*, p. 166.

(c) The concluding clause, beginning, *Therefore it is commanded, etc.*, is an entry of the award of the mode of decision. Where this is by jury, the award is that of a writ of *venire factas* to summon a jury; to which the language of the above entry refers.

(d) For the form of entering the issue, as above given, see Tidd's Appendix, chs. xxxi, xxxix; 1 Arch. Pract. 184.

§ 85. The decision of issues in law is vested (as it always has been) (e) exclusively in the judges of the court. Therefore when, upon a demurrer, the issue in law has been entered on record in the manner above described, it is *entered for argument* — that is, set down to be argued in court on a day appointed for the purpose. On that day, or as soon afterwards as the business of the court will permit, it is accordingly argued *viva voce*, in court, by the respective counsel for the parties; and the judges, in the same manner and place, pronounce their decision according to the majority of voices.

The manner of deciding issues *in fact* will require explanation at greater length.

§ 86. Trial of issues in fact.—The decision of the issue in fact is called the *trial*. (f). The different methods of trial now in force are the following: The trial by *jury*, by the *grand assize*, by the *record*, by *certificate*, by *witnesses*, by *inspection*, and by *wager of law*. (g)

These occur, however, in very different degrees of frequency in practice. Every mode of trial except that by jury is of rare admissibility; being not only confined to a few questions of a *certain nature*, but in general also, if not universally, to such questions when arising in a *certain form of issue*. (h) And to all issues not thus specially provided for, the trial by jury applies, as the ordinary and only legitimate method. (i) On the other hand, however, it is to be observed, with respect to these occasional modes of trial, that, *when competent*, they are in general *exclusively appropriate*; so that the party by whom they are proposed in the pleading has a right to insist on their being applied, to the exclusion of the trial by jury.

§ 87. Trial by jury.—First shall be considered the ordinary method, or trial *by jury*.

It will be remembered that when the parties have mutually referred the issue to decision by a jury, or (as it is technically termed) have *put themselves upon the country*, there is entered upon the roll (as in all other cases) the award of the mode of

(e) *Supra*, p. 102.

(f) See Appendix, note (30).

(g) *Vide* 3 Bl. Com. 330, where the enumeration is the same; with only the nominal difference that the grand assize is there classed as a species of trial by jury.

(h) *Vide* Cro. Jac. 102.

(i) *Ilderton v. Ilderton*, 2 H. Bl. 145.

decision adopted. In the case of the trial by jury, that award directs the issuing of the writ of *venire facias*, commanding the sheriff of the county where the facts are alleged by the pleading to have occurred, to summon a jury to try the issue; (*k*) and such writ is accordingly sued out. The following is an example of its modern form:

VENIRE FACIAS.

Upon the issue, supra, p. 170.

George the Third, etc., to the Sheriff of —, Greeting:

We command you that you cause to come before us, on —, wheresoever we shall then be in England, twelve free and lawful men of the body of your county, each of whom has ten pounds a year at the least of lands, tenements or rents, by whom the truth of the matter may be better known, and who are in no wise of kin either to A. B., the plaintiff, or to C. D., late of —, Esquire, the defendant, to make a certain jury of the country between the parties aforesaid of a plea of breach of covenant, because as well the said C. D. as the said A. B., between whom the matter in variance is, have put themselves upon that jury; and have there the names of the jurors and this writ.

Witness, Sir Charles Abbott, Knight, at Westminster, the — day of — in the — year of our reign. (*l*)

The *venire facias*, it will be observed, directs the jury to be summoned to appear in *the superior court*. This is because the trial was in fact anciently had there. But, except in some few cases to be presently noticed, the trial by jury no longer takes place before the superior court. It is now usually conducted in the county where the facts are alleged in pleading to have occurred and into which the *venire facias* issues; and before certain judges called the *justices of assize and nisi prius*. The trial is in such cases said to be had at *nisi prius*; (*m*) and when it is to be so had, the course of proceeding is, after an issue to be tried by jury has been entered on record on the issue roll, to sue out the *venire facias*, together with another writ, for compelling the attendance of the jury, called the *distringas* in the king's bench, in the common pleas the *habeas corpora*. The next step is to make up

(*k*) *Vide* the form of this award, *supra*, p. 170.

(*l*) Tidd's Appendix, 208.

(*m*) See Appendix, note (31).

and pass, at the proper offices, another record on a parchment roll, called *the record of nisi prius*; which is a transcription from the issue-roll, (n) and contains a copy of the pleadings and issue. This *nisi prius* record is then delivered to the judges of assize and *nisi prius*, and serves for their guidance as to the nature of the issue to be tried. The trials at *nisi prius* now take place in London and Middlesex, several times in the course of each term, and also during a considerable part of each vacation; in every other county, they are held twice a year, and always in time of vacation. The justices of assize and *nisi prius*, for trials in London and Middlesex, consist of the chief justices of the three courts respectively,—each trying only the issues from his own court. For trials in the other counties, they consist of such persons as are appointed for the purpose, by temporary commission from the crown; among whom are usually for each circuit two of the judges of the superior courts; the whole kingdom being divided into six circuits for the purpose.

§ 88. Trial by jury.—Though the trial by jury is thus in general had at *nisi prius*, this is not universally the case; for in cases of great difficulty and consequence, these inquests are allowed to be taken before the four judges in the superior court in which the pleading took place,—as in the ancient practice. The proceeding is then technically said to be a trial *at bar*, by way of distinction from the trial *at nisi prius*.¹

After these explanations as to the time and place of trial by jury, the next subject for consideration is the course of the proceeding itself.

(n) 2 Tidd, 700.

¹ Trials of issues in fact by the court is a very usual mode of trial at the present day; and in order to make it appear upon the record whether the trial judge was basing his conclusion upon a certain finding of fact or an erroneous view of law, the practice is to submit to him propositions of law. In this manner the facts are separated from the law, and the questions both of law and fact may be argued in the appellate tribunal. If such propositions are not asked, the presumption is indulged that the court held the facts against the defeated party under a correct view of the law. These propositions should be propositions of law, not of fact, as the finding will be upon the fact. *Field v. Crawford*, 146 Ill. 186; *Commercial Nat. Bank v. Canniff* (Ill., 1894), 87 N. E. Rep. 898; *Am. Ex. Bank v. Chicago Nat. Bank*, 181 Ill. 547.

The whole proceeding of trial by jury takes place under the superintendence of the presiding judge or judges, who usually decide all points as to the admissibility of evidence, and direct the jury on all such points of law arising on the evidence as is necessary for their guidance in appreciating its legal effect, and drawing the correct conclusion in their verdict.¹

After hearing the evidence of the witnesses, the addresses of counsel, and the charge of the judge, the jury pronounce their *verdict*; which the law requires to be *unanimously* given. The verdict is usually in general terms, "for the plaintiff," or "for the defendant;" finding at the same time (in case of verdict for the plaintiff, and where *damages* are claimed by the action) the amount of *damages* to which they think him entitled.

The principles upon which the law requires the jury to form their decision are as follows:

1. They are to take no matter into consideration but the question *in issue*; for it is to try the issue, and that only, that they are summoned.² Thus, upon pleadings such as are recorded in the issue roll (*supra*, p. 170), they would only have to consider whether the release was executed by duress or not. Of the execution of the indenture of lease they could not inquire; for it is not *in issue*.

2. They are bound to give their verdict for the party who, upon the proof, appears to them to have succeeded in estab-

¹ See *Eastman v. Manufacturing Co.*, 44 N. H. 143, 82 Am. Dec. 201; *Deming v. Foster*, 42 N. H. 165.

² Nothing but the immediate question in issue is settled by the verdict. *McGinnis v. Canada South. Bridge Co.*, 49 Mich. 466. Without an issue a verdict is void. *Stephens v. People*, 18 Ill. 131; *Israel v. Reynolds*, 11 id. 218; *Reynolds v. Stockton*, 140 U. S. 254. The statement in *Thompson on Trials*, section 2310, if intended to state that the jury or court may try anything beyond the issue, is not supported by authority. The object of the verdict is to respond to and decide the issues between the parties upon the evi-

dence adduced, and to declare the respective rights of the parties as involved in the issue with certainty, so that the judgment can be entered with like certainty, and the ministerial officers can carry it into execution without determining additional facts. *Barnet v. Caruth*, 20 Tex. 173; *Staford v. King*, 30 id. 257. See, also, *Patterson v. United States*, 2 Wheat. 221; *Brockway v. Kinney*, 2 Johns. 210; *Groves v. Bailey*, 24 Miss. 588; *Gross v. Sloan*, 54 Ill. App. 202; *Moody v. Keener*, 7 Port. (Ala.) 218; *Ronge v. Dawson*, 9 Wis. 246; *Hob.* 58.

lishing his side of the issue.¹ Thus, in the same example, the verdict must be given for the plaintiff, if the jury think the duress is established in proof; otherwise, for the defendant.

§ 89. **Burden of proof.**—3. The burden of proof generally is upon that party who, in pleading, maintained the *affirmative* of the issue; for a *negative* is, in general, incapable of proof.² Consequently, unless he succeed in proving that affirmative, the jury are to consider the opposite proposition, or negative of the issue, to be established. Thus, in the same example, it would be for the plaintiff to prove the duress, for it is he who affirms it; and if, on such proof, he fails, or offers no proof, the jury must find for the defendant.

§ 90. **Variance.**—Under this head comes to be considered the doctrine of *variance*. The proof offered may, in some

¹ Issues in civil cases are to be determined in accordance with the preponderance of the evidence. It is not required that the evidence should be satisfactory. In this respect a civil case differs from a criminal one, and for a manifest reason. In a civil case the jury must find in favor of one or the other party, though the evidence be never so unsatisfactory. So it is said that the rights of men must be determined by probability. *Burrill on Circumstantial Evidence*, p. 81; *Gammon v. Ruffin*, 151 Mass. 204; *Beardstown v. Virginia*, 76 Ill. 44; *Graves v. Colwell*, 90 id. 612; *Stratton v. Cent. C. H. R. Co.*, 95 id. 25. The ordinary presumptions of innocence, continuance of facts, failure to testify as to facts within knowledge, all act as evidence in a case. *Gammon v. Ruffin*, *supra*; 1 *Greenleaf on Evidence*, sec. 41; *Shipherd v. Underwood*, 55 Ill. 482; *Gordon v. People*, 33 N. Y. 509; *Jones v. Greaves*, 26 Ohio St. 2; *Best's Right to Begin*, 81. These presumptions no enlightened tribunal disregards. *New Orleans v. United States*, 10 Pet. 721; *Jackson v. Warford*, 7 Wend. 62; *Hutchinson v. Dubois*, 45 Mich. 148;

Marquette v. Ward, 50 id. 174; *Wood v. Barker*, 49 id. 295; *Campbell v. Sherman*, 49 id. 534. The verdict must not be found upon a statement of the facts by a juror. *Foster's Will*, 34 Mich. 31.

² Where a fact rests in the knowledge of a party and he fails to make it appear so as to clear up the case, the jury may infer against the party on that account. *Lockhart v. White*, 77 Ga. 786. See *McEvry v. Swayze* (Neb.), 51 N. W. Rep. 824; *Odum v. Rutledge & J. R. Co.*, 94 Ala. 454. As to who has the burden of proof and right to open and close, see *Benham v. Rowe*, 2 Cal. 387; *Harvey v. Illithorpe*, 26 Ill. 418; *Beatty v. Hatcher*, 18 Ohio St. 115; *Yingling v. Hesson*, 16 Md. 112; *Marshall v. Am. Exp. Co.*, 7 Wis. 1; *Kent v. Mason*, 79 Ill. 541; *McReynolds v. B. & O. R. R. Co.*, 106 id. 152; *Carpenter v. First Nat. Bank*, 119 id. 352. As to whether defendant can obtain the open and close in slander and libel, see *Thompson on Trial*, § 280; *Fry v. Bennett*, 28 N. Y. 824; *Mercer v. Whall*, 5 Ad. & El. (N. S.) 447-468; *Best's Right to Begin*, 84.

cases, *wholly* fail to support the affirmative of the issue; but in others it may fail by a *disagreement in some particular point or points only* between the allegation and the evidence.¹ Such disagreement, when upon a material point, is called a *variance*, and is as fatal to the party on whom the proof lies as a total failure of evidence; the jury being bound, upon *variance*, to find the issue against him. For example: the plaintiff declared in covenant for not repairing pursuant to the covenant in the lease, and stated the covenant as a covenant to "repair when and as need should require;" and issue was joined on a traverse of the deed alleged. The plaintiff, at the trial, produced the deed in proof, and it appeared that the covenant was thus: to repair "when and as need should require, *and at farthest after notice*;" the latter words having been omitted in the declaration. This was held to be a *variance*, because the additional words were material, and qualified the legal effect of the contract. (o) On the other hand, however, the principle is not so rigorously observed as to oblige the party on whom the proof lies to make good his allegation to the *letter*. It is enough if the *substance* of the issue is exactly proved; (p) and a *variance in mere form*, or in *matter quite immaterial*, will not be regarded.² Thus, in

(o) *Horsefall v. Testar*, 7 Taunt. 385; and see *Browne v. Knill*, 2 Brod. & Bing. 395; *Vansandan v. Burt*, 5 Barn. & Ald. 42.

(p) Com. Dig., Pleader. sec. 26; Vin. Ab., Evidence, note a, 10; B. N. P. 309; Doct. Pl. 191, 205; *Price v. Brown*, 1 Wils. 116; *Coare v. Giblett*, 4 East, 90; and see the cases cited, 1 Arch. 336.

¹ It is said that the codes recognize three degrees of variance: 1. An immaterial variance. 2. When the proof varies from the allegation. 3. Where the evidence wholly fails to agree with the allegation. Pomeroy's Code Rem., § 552. But it is apparent that the immaterial variance is no variance in law, and that the analysis differs only in form of expression.

² See *Buhl v. Trowbridge*, 42 Mich. 44; *McDonough v. Heyman*, 38 id. 334; *Patterson v. Detroit, L. & N. R. Co.*, 56 id. 178; *Lull v. Davis*, 1 id. 77; *Arnold v. Angell*, 62 N. Y.

508; *Harper v. Milwaukee*, 30 Wis. 365; *Fisk v. Tank*, 12 id. 276; *Dean v. Notes*, 23 Ohio St. 388; *Supervisors v. Decker*, 30 Wis. 624; *Ross v. Mathen*, 51 N. Y. 108; *Roth v. Roth*, 31 Wis. 570; *Anderson v. Case*, 28 id. 505; *Terry v. Munger*, 121 N. Y. 161. The cases on election of remedy will illustrate this point. Where the party could not have been misled, a variance in the description of a written instrument in the pleadings will be disregarded. *Rorabacher v. Lee*, 16 Mich. 169; *Lathrop v. Southworth*, 5 id. 486. Where the declaration contains several counts

debt on bond conditioned for payment of money, where the defendant pleaded payment of principal and interest, and the plaintiff replied that he had not paid all the principal and interest, and issue was joined thereon, and the proof was that the whole interest was not in fact paid; but that the defendant paid a sum in gross, which was accepted, in full satisfaction of the whole claim,—the issue was considered as sufficiently proved on the part of the defendant. (q)¹

§ 91. The verdict, when given, is afterwards drawn up *in form*, and entered on the back of the record of *nisi prius*.² This is done, upon trials in London and Middlesex, by the attorney for the successful party; in other cases, by an officer of the court. (r) Such entry is called the *postea*, from the word with which, at a former period (when the proceedings were in Latin), it commenced. The *postea* is drawn up *in the negative or affirmative of the issue*, as will appear by the following example:

POSTEA.

For the Plaintiff, on the Issue, at p. 170, if tried at Nisi Prius, in London or Middlesex.

Afterwards, that is to say, on the day, and at the place within contained, before the Right Honorable Sir Charles Abbott, Knight, the chief justice within mentioned (John

(q) Str. 690.

(r) 2 Tidd, 798 (4th ed.).

and there is a variance between the first count and the proof, but such variance does not extend to the other counts, the recovery may be sustained under these counts. *L. E. & W. R. R. Co. v. Middlecoff*, 150 Ill. 27.

¹ Variance must be pointed out upon the trial that it may be obviated by amendment. *Nelson v. Smith*, 54 Ill. App. 845. See *McHardy v. Wadsworth*, 8 Mich. 349; *McCoy v. Brennan*, 61 id. 362; *Merkle v. Bennington*, 68 id. 133; *Slater v. Chapman*, 67 id. 523.

² In Illinois there is no fixed rule as to the form in which the verdict is to be rendered. The clerk is to

enter it in form under the direction of the court. It may be reduced to writing and signed by the jury, or it may be delivered orally. *Griffin v. Larned*, 111 Ill. 432. If it is in writing and signed, and is good in substance, the court may, in the presence of the jury, reduce it to form, if defective. *Osgood v. McConnell*, 32 Ill. 74; *Pekin v. Winkel*, 77 id. 56; *Godfriedson v. People*, 88 id. 284. And see *Sleight v. Henning*, 12 Mich. 371. Or the jury may be sent back with instructions as to the proper form (*Smith v. Williams*, 22 Ill. 357), if good in substance, that is, sufficient under the

Henry Abbott, Esquire, being associated to the said chief justice, according to the form of the statute in such case made and provided), come as well the within-named A. B. as the said C. D., by their respective attorneys within mentioned; and the jurors of the jury, whereof mention is within made, being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, say, upon their oath, that the said A. B. was, at the time of the making of the said deed of release within mentioned, unlawfully imprisoned and detained in prison by the said C. D., until by force and duress of that imprisonment he, the said A. B., made the said deed of release in manner and form as the said A. B. hath within alleged. And they assess the damages of the said A. B. by reason of the said breach of covenant within assigned, over and above his costs and charges by him about his suit in this behalf expended, to fifty pounds; and for those costs and charges to forty shillings. Therefore, etc. (s)

Such is the course of trial at *nisi prius*, in its direct and simple form; and the practice of a trial *at bar* is, in a general view, the same. Trials by jury, however, whether at bar or *nisi prius*, are subject to certain varieties of proceeding; some of which require to be here noticed.

§ 92. Bill of exceptions.—If, at the trial, a point of law arises, either as to the *legal effect* or the *admissibility* of the evidence, the usual course (as already stated) is for the judge to decide these matters.¹ But it may happen that one of the parties is dissatisfied with the decision, and may wish to have

(s) Tidd's Appendix, ch. xxxvii; 5 Went. 52.

statute of jeofails. *Wiggins v. Chicago*, 68 Ill. 372; *Lincoln T'p v. Cambria Iron Co.*, 103 U. S. 412. The court usually, in the first instance, indicate to the jury, before retiring, in what language the verdict should be announced. *Illinois Cent. R. R. Co. v. Wheeler*, 149 Ill. 525.

¹ The order of introducing proof is largely within the discretion of the judge, but not entirely so. *Lafayette, B. & M. R. Co. v. Winslow*, 66 Ill. 219; *Lycoming Ins. Co. v. Rubin*, 79 id. 402; *People v. Parish*, 4 Denio, 153.

The proper course of counsel upon the offering of evidence which he

considers inadmissible, either on account of the incompetency of the instrument of proof, whether a witness or document, or because of irrelevancy, is to object, and the ruling of the court may be preserved by the party against whom the ruling is made, by an exception. See Bill of Exception. *Bloomington v. Legg*, Adm'r, 151 Ill. 9.

If by no theory the evidence objected to can be competent, a general objection will suffice; but if the objection could be obviated, the special grounds of the objection must be stated. *Brandt v. Trimmer*, 47 N. Y. 96; *St. Clair Co. Benevolent*

it revised by a superior jurisdiction. If he is content to refer it to the superior court in which the issue was joined, and out of which it is sent (called, by way of distinction from the court at *nisi prius*, the court *in bank*), his course is to move, in that court, for a *new trial*; a proceeding of a future or subsequent period, which will be considered hereafter in its proper place. But, as the *nisi prius* judge himself frequently belongs to that court, a party is often desirous, under such circumstances, to obtain the revision of some court of *error*; i. e., some court of appellate jurisdiction having authority to correct the decision. For this purpose it becomes necessary to put the question of law *on record* for the information of such court of error; and this is to be done pending the trial, in a form marked out by an old statute (Westminster 2; 13 Ed. I., ch. 31). The party excepting to the opinion of the judge *tenders* him a *bill of exceptions*; that is, a statement in writing of the objection made by the party to his decision; to which statement, if truly made, the judge is bound to set his seal, in confirmation of its accuracy. The cause then proceeds to verdict, as usual, and the opposite party, for whom the verdict is given, is entitled, as in the common course, to judgment upon such verdict in the court in bank; for that court takes no notice of the bill of exceptions. (z) But the whole record being afterwards removed to the appellate court by *writ of error* (a proceeding to be hereafter explained), the bill of exceptions is then taken into consideration in the latter court and there decided. (u) ¹

Though the judge usually gives his opinion on such points of law as above supposed, yet it sometimes happens that for various reasons he is not required by the parties, or does not wish to do so. In such case several different courses may be pursued for determining the question of law.

(z) 1 Sel. 470.

(u) See the whole course of proceeding on a bill of exceptions, minutely stated, 3 Burr. 1692; and on the subject of bill of exceptions generally, see 2 Lev. 286; Salk. 288; 2 Black. 929; 2 T. R. 125; 1 Bos. & Pul. 32; 5 East, 49.

Soc. v. Fietsam, 97 Ill. 477; Harden v. Forsythe, 99 id. 326.

On an objection to the competency of a witness the objector has the burden, and should open and close the

argument; but on objection for want of relevancy, the party offering the evidence has the burden. Best's Right to Begin, p. 37, note.

¹ See Bill of Exceptions, *infra*.

§ 93. **Demurrer to evidence.**—First, a party disputing the legal sufficiency of any evidence offered, or its admissibility in point of law, may *demur to the evidence*. A *demurrer to evidence* is analogous to a demurrer in pleading; the party from whom it comes declaring that he will not proceed because the evidence offered on the other side is not sufficient to maintain the issue. Upon joinder in demurrer by the opposite party, the jury are, in general, discharged from giving any verdict; (x) and the demurrer, being entered *on record*, is afterwards argued and decided in the court in bank; and the judgment there given upon it may ultimately be brought before a court of error. (y)¹

§ 94. **General and special verdict.**—A more common, because more convenient, course than this, to determine the legal effect of the evidence, is to obtain from the jury a *special verdict* in lieu of that *general* one, of which the form has already been described. For the jury have an option, instead of finding the *negative* or *affirmative of the issue*, as in a general verdict, to find *all the facts of the case as disclosed upon the evidence before them*, and, after so setting them forth, to conclude to the following effect: "that they are ignorant, in point of law, on which side they ought, upon these facts, to find the issue; that if, upon the whole matter, the court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly, and assess the damages at such a sum, etc.; but if the court are of an opposite opinion, then *vice versa*. This form of findings is called a *special verdict*. However, as on a general verdict, the jury do not themselves actually frame the *postea*, so they have, in fact, nothing to do with the formal preparation of the special verdict. When it is agreed that a verdict of that kind is to be given,

(x) 1 Arch. Pract. 186.

(y) For full information on the subject of demurrer to evidence, see *Johnson v. Hunter*, 2 H. Bl. 187.

¹ A demurrer to the evidence, a motion to exclude all the evidence, and a motion for a verdict, all perform substantially the same office, and have the same effect as an admission. *Snydam v. Williamson*, 20 How. 483; *C. & N. W. Ry. v. Dunleavy*, 129 Ill. 182; *C. & A. Ry. v. Adler*, 129 id. 385; *Crowe v. People*, 92 id. 231; *Dormady v. State Bank*, 2 Scam. 236; *Fent v. T. P. & W. Ry.*, 59 id. 349; *Penn Co. v. Conlon*, 101 id. 93. See *Mitchell v. Mo. P. Ry.*, 83 Mo. 106. See, also, *Directing a Verdict*, p. 207.

the jury merely declare their opinion as to any fact remaining in doubt; and then the verdict is adjusted without their farther interference. It is settled, under the correction of the judge, by the counsel and attorneys on either side, according to the state of facts as found by the jury, with respect to all particulars on which they have delivered an opinion, and with respect to other particulars according to the state of facts which it is agreed that they *ought* to find upon the evidence before them. The special verdict, when its form is thus settled, is, together with the whole proceedings on the trial, then entered *on record*; and the question of law arising on the facts found is argued before the court in bank, and decided by that court, as in case of demurrer. If the party be dissatisfied with their decision, he may afterwards resort to a court of error.¹

It is to be observed that it is a matter entirely in the *option of the jury* whether their verdict shall be general or special. (2) The party objecting in point of law cannot therefore *insist* on having a special verdict, and may consequently be driven to *demur to the evidence*—at least if he wishes to put the objection *on record*, without which no writ of error can be brought, nor the decision of a *court of error* obtained. But if the object be merely to obtain the decision of the court in bank, and it is not wished to put the legal question *on record* in a view to a *writ of error*, then the more common (because the cheaper and shorter) course is, neither to take a *special verdict* nor *demur to the evidence*, but to take a *general verdict, subject* (as the phrase is) *to a special case*; that is, to a written statement of all the facts of the case, drawn up for the opinion of the court in bank, by the counsel and attorneys on either

(2) 1 Arch. Pract. 189.

¹ A special verdict is one by which the facts of the case are put on record, and the law submitted to the judges. 2 Bosw. 623; Vincent v. Morrison, Breese (Ill.), 175; Newell, Mal. Pros. 553. The special verdict should find facts, not mere evidence. The court has to do with questions of law only. Chicago, etc. R. Co. v. Dunleavy, 129 Ill. 132; Seward v. Jackson, 8 Cow. 406; Kinsley v. Coyle, 58 Pa. St. 461; Vincent v. Morrison, *supra*. Finding sufficient evidence *prima facie* to establish facts essential upon which to found the judgment is not sufficient. All the essential facts must be found. Blake v. Davis, 20 Ohio, 231. A special verdict cannot be aided by intendment. Lee v. Campbell, 4 Porter (Ala.), 198; Turrell v. Watson, 2 Munf. 283.

side, under correction of the judge at *nisi prius*, according to the principle of a special verdict, as above explained. The party for whom the general verdict is so given is, of course, not entitled to judgment till the court in bank has decided on the special case; and according to the result of that decision the verdict is ultimately entered either for him or his adversary. A special case is not (like a special verdict) entered *on record*; and consequently a writ of error cannot be brought on this decision.¹

— § 95. *Proceedings after verdict.*— We must now return to the course of proceeding after trial by jury, in what has been here called its direct or simple form.

The proceedings on trial by jury at *nisi prius* or *at bar* terminate with the verdict.

In case of trial at *nisi prius*, the return-day of the last jury process, the *distringas* or *habeas corpora* (which, like all other judicial writs, is made returnable into the court from which it issues), always falls on a day in term subsequent to the trial, and forms the next *continuance* of the cause. On the day given by this continuance, therefore, which is called the *day in bank*, the parties are supposed again to appear in the court in bank, and are in a condition to receive judgment. On the other hand, in case of trial at bar, the trial takes place on or after the return-day of the last jury process; and therefore, immediately after the trial, the parties are in court, so that judgment might be given. In either case, however, a period of four days elapses before, by the practice of the court, judgment can be actually obtained. And during this period certain proceedings may be taken by the unsuccessful party to avoid the effect of the verdict. He may move the court to grant a *new trial*, or to *arrest the judgment*, or to *give judgment non obstante veredicto*, or to *award a repleader*, or to *award a venire facias de novo*. (a) Of these, briefly, in their order.

(a) 2 Tidd, 798.

¹ This practice does not generally obtain in America. A special verdict may be required, and it is common to provide by statute for special findings of fact by the jury. That these two are not the same, see C. & N. W. Ry. v. Dunleavy, 129 Ill. 183; Seward v. Jackson, 8 Cow. 406; Kinsley v. Coyle, 58 Pa. St. 461; Leach v. Church, 10 Ohio St. 149; Alhambra Add. W. Co. v. Richardson, 72 Cal. 598; Elgin, J. & E. R. Co. v. Ray-

1. *With respect to a new trial:* It may happen that one of the parties may be dissatisfied with the opinion of the *nisi prius* judge, expressed on the trial, whether relating to the effect or admissibility of evidence, or may think the evidence against him insufficient in law, where no adverse opinion has been expressed by the judge, and yet may not have obtained a special verdict, or demurred to the evidence, or tendered a bill of exceptions. He is at liberty, therefore, after the trial and during the period above mentioned, to move the court in bank to grant a *new trial* on the ground of the judge's having *misdirected the jury*,¹ or having *admitted or refused evidence contrary to law*,² or (where there was no adverse direction of the judge) on the ground that the jury gave their verdict *contrary to the evidence*, or *on evidence insufficient in law*.³ And resort may be had to the same remedy in other cases where justice appears not to have been done at the first trial; as where the verdict, though not wholly contrary to evidence or on insufficient evidence in point of law, is manifestly wrong in point of discretion, as *contrary to the weight of evidence*, and on that ground disapproved by the *nisi prius* judge.⁴ So a new trial may be moved for where *a new and material fact has come to light* since the trial, which the party did not know and had not the means of proving before the jury,⁵ or where

mond, 148 Ill. 241; Suydam v. Williamson, 20 How. 427; Mumford v. Wardwell, 6 Wall. 423; Collins v. Riley, 104 U. S. 322; Barnes v. Rem-bady, 150 Ill. 192.

¹ These matters are so purely practice that nothing more can be given here than some idea of where to find the subjects fully discussed. For the form and requisites of instructions, see Sacket on Instructions; Illinois Linen Co. v. Hough, 91 Ill. 63; Kamphouse v. Gaffner, 78 id. 458; Hoener v. Koch, 84 id. 408; Herrick v. Gary, 83 id. 86.

² The evidence must have been material. Thompson v. Thompson, 77 Ga. 692; Glover v. Flowers, 101 N. C. 184; Dannenberg v. Guernsey, 80 Ga. 549; Gainesville v. Caldwell, 81 id.

76; Huntington & Broad Top Mount. Co. v. Decker, 82 Pa. St. 119; Nash v. Gilkeson, 5 S. & R. 352; Clark v. Lake, 1 Scam. 229; Sertel v. Graeter, 112 Ind. 117; Briant v. Trimmer, 47 N. Y. 96; Chicago W. D. R. Co. v. Klauber, 9 Brad. 613.

³ Kelly v. Mack, 49 Cal. 523; Beal v. Stone, 22 Iowa, 447; Heine v. Morrison, 13 Mo. App. 577; Weston v. Johnson, 48 Ind. 1; Herrick v. Gary, 83 Ill. 86; Hoener v. Koch, 84 id. 408.

⁴ Sharp v. Hoffman, 79 Cal. 404; Ruffner v. Hill, 81 W. Va. 426; Steinmetz v. Currey, 1 Dall. 284; Maryland Ins. Co. v. Ruden, 6 Cranch, 388.

⁵ The newly-discovered evidence must be material. Atlanta v. Bu-

the damages given by the verdict are *excessive*,¹ or where the jury have *misconducted themselves*, as by casting lots to determine their verdict, etc.² In these and the like instances the court will, on motion and in the exercise of their discretion, under all the circumstances of the case, grant a new trial, that opportunity may be given for a more satisfactory decision of the issue.³ A new jury process consequently issues, (b) and

(b) 2 Tidd, 808.

chanan, 76 Ga. 585; Hall v. Lyons, 29 W. Va. 410; Morgan v. Bell, 41 Kan. 345. It must be evidence that could not have been obtained before the trial. Baker v. Jamison, 73 Iowa, 698; Beachley v. McCormick, 41 Kan. 485; Feads v. Albea, 69 Tex. 437, 5 Am. St. R. 79; Booth v. McJilton, 82 Va. 827; Ward v. Voris, 117 Ind. 368; Patterson v. Collier, 77 Ga. 292. Cumulative evidence is insufficient ground for a new trial. Brinson v. Faircloth, 82 Ga. 185; Gilmore v. Brost, 39 Minn. 190; Brooks v. Dutcher, 22 Neb. 644; Smith v. Watson, 82 Va. 712; Fuller v. Harris, 29 Fed. Rep. 814; Mowry v. Raabe, 89 Cal. 606; Plumb v. Campbell, 129 Ill. 101; Donnelly v. Burkett, 75 Iowa, 618; Chandler v. Thompson, 80 Fed. Rep. 38; Thrasher v. Postel, 79 Wis. 508. Newly-discovered evidence for the purpose of impeaching a witness is insufficient to justify a new trial. State v. Burt, 41 La. Ann. 787, 6 L. R. A. 79.

¹ Sutherland on Damages; Com. v. Justices, 5 Mass. 435; Beveridge v. Welch, 7 Wis. 467; Chicago W. D. R. Co. v. Hughes, 87 Ill. 94; Ray v. Thompson, 26 Mo. App. 431; Lake E. etc. Ry. v. Acres, 108 Ind. 548.

² Irwin v. Miller, 28 Ill. 401; Ill. Cent. R. Co. v. Swearingen, 47 id. 206; Hayward v. Knapp, 22 Minn. 5; Tripp v. Com'rs, 2 Allen (Mass.), 556; Peoria & R. I. R. Co. v. Birkett, 63 Ill. 332; Jeffries v. Randall, 14 Mass. 205.

³ In addition to the above, it may be noticed that the disqualification of a juror — on the ground, for example, of bias, interest or preconceived opinion — is ground for a new trial. See Rollins v. Ames, 21 N. H. 349, 9 Am. Dec. 79; Herbert v. Shaw, 11 Mod. 111; Eggleston v. Smiley, 17 Johns. 133; United States v. Fries, 3 Dall. 515; Hudspeth v. Herston, 64 Ind. 133; Sewell v. State, 15 Tex. App. 56; Busick v. State, 19 Ohio, 198; Percy v. Mich. Mut. L. Ins. Co., 111 Ind. 59. A new trial will not be so readily granted for such disqualifications as age, alienage and property. Brewer v. Jacobs, 22 Fed. Rep. 234. And if the party knew of the disqualification and made no reasonable objection, the motion will be denied. Bronson v. People, 32 Mich. 34; Fox v. Hazelton, 10 Pick. 275; Davis v. Allen, 11 id. 466, 23 Am. Dec. 386; Quinebaug Bank v. Leavens, 20 Conn. 87, 50 Am. Dec. 272; Brown v. Autrey, 78 Ga. 753; Parmele v. Guthery, 2 Root, 185, 1 Am. Dec. 65; Ipswitch v. Fernandez, 84 Cal. 639; Buck v. Hughes, 127 Ind. 46. See Jewell v. Jewell, 84 Me. 304, 18 L. R. A. 473, and note by Mr. A. P. Will.

Misconduct of a party by communication with a juror, treating, or any action which satisfies the court that the party is working upon the jury, will be ground for new trial. Martin v. Morelock, 83 Ill. 485; Lyons v. Lawrence, 12 Brad. 531; Knight v. Freeport, 13 Mass. 218; Walker v.

the cause comes on to be tried *de novo*. But, except on such grounds as these, tending manifestly to show that the discretion of the jury has not been legally or properly exercised, a new trial can never be obtained; for it is a great principle of law that the decision of a jury, upon an issue in fact, is in general irreversible and conclusive. (c) ¹

2. *Arrest of judgment*: Again, the unsuccessful party may move in *arrest of judgment*; that is, that the judgment for the plaintiff be arrested or withheld on the ground that there is some *error appearing on the face of the record* which vitiates the proceedings. In consequence of such error, on whatever part of the record it may arise, from the commencement of the suit to this period, the court are bound to arrest the judgment. It is, however, only with respect to objections apparent on the *record* that such motions can be made. Nor can it be made, generally speaking, in respect of *formal* objections. This was formerly otherwise, and judgments were constantly arrested for errors of mere form; (d) but this abuse has been long remedied by certain statutes, passed at different periods, to correct inconveniences of this kind and commonly called *the statutes of amendment and jeofails*, (e) by the effect of which, judgment, at the present day, cannot, in general, be arrested for any objection of *form*.²

(c) See Appendix, note (32).

(d) See 2 Reeves, 448; 3 Bl. Com. 407.

(e) See Appendix, note (33).

Walker, 11 Ga. 208; Bradbury v. Cony, 62 Me. 228; Hamilton v. Pease, 38 Conn. 115; Tomlin v. Cox, 19 N. J. L. 76; Cilley v. Bartlett, 19 N. H. 812. See Hutchinson v. Consumers' Coal Co., 36 N. J. L. 24. Any attempt to influence testimony or trial by improper means suffices. Chicago City Ry. v. McMahon, 103 Ill. 485.

¹ As we have seen, this is now true only in a qualified sense. If the verdict is not supported by the evidence, or if it is clearly the result of prejudice or passion, the verdict may be set aside. Tripp v. Grounder, 60 Ill. 474; Gibson v. Webster, 44 id. 488; Loewenthal v. Strong, 90 id. 74.

² This paragraph is cited in Puterbaugh's Ill. Pr. & Pl. 811, where are cited many cases illustrating arrest of judgment. Commercial Ins. Co. v. Bank, 61 Ill. 488; Creswell v. Packham, 6 Taunt. 680; Quincy Coal Co. v. Hood, 77 Ill. 68; Campton v. People, 86 id. 176; Com. v. Hinds, 101 Mass. 209; African M. E. Ch. v. McGruder, 73 Ill. 516; Matson v. Swanson, 131 id. 255; Am. Ex. Co. v. Pinckney, 29 id. 392; Ind. Order v. Paine, 122 id. 625. The codes do not change the law, but the scope of the remedy is much modified by statutes. People v. Swenson, 49 Cal. 888; State v. Raymond, 20 Iowa, 582; McGuire v. State,

3. *Judgment non obstante veredicto*: If the verdict be for the defendant, the plaintiff, in some cases, *moves for judgment non obstante veredicto*; that is, that judgment be given in his own favor *without regard to the verdict* obtained by the defendant. This motion is made in cases where, after a pleading by the defendant in confession and avoidance, as, for example, a plea in bar, and issue joined thereon, and verdict found for the defendant, the plaintiff, on retrospective examination of the record, conceives that such plea was bad in substance and might have been made the subject of demurrer on that ground. If the plea was itself substantially bad in law, of course the verdict, which merely shows it to be true in point of fact, cannot avail to entitle the defendant to judgment; while, on the other hand, the plea, being in confession and avoidance, involves a confession of the plaintiff's declaration and shows that he was entitled to maintain his action. In such case, therefore, the court will give judgment for the plaintiff *without regard to the verdict*; and this, for the reason above explained, is also called a judgment *as upon confession*. (*f*) Sometimes it may be expedient for the plaintiff to move for judgment *non obstante*, etc., even though the verdict be *in his own favor*; for, if in such a case as above described, he takes judgment as *upon the verdict*, it seems that such judgment would be erroneous, and that the only safe course is to take it *as upon confession*. (*g*)¹

4. *The motion for a repleader* is made where the unsuccessful party, on examination of the pleading, conceives that the issue joined was an *immaterial* issue, *i. e.*, not taken on a point proper to decide the action. It has been shown (*h*) that the

(*f*) *Lacy v. Reynolds*, Cro. Eliz. 314; *Staple v. Heydon*, 6 Mod. 10; *The King v. Phillips*, Stra. 394; *Potts v. Polehampton*, 1 Lord Raym. 641; *Clears v. Stevens*, 8 Taunt. 418; and see the forms of such judgments. Rast. Ent. 632; 2 Rol. Ab. 99; *Jones v. Bodlimer*, Carth. 373; *Wilkes v. Broadbent*, 1 Wils. 63.

(*g*) *Wilkes v. Broadbent*, 1 Wils. 63; *Dighton v. Bartholomew*, Cro. Eliz. 773; 2 Rol. Ab. 99.

(*h*) *Vide supra*, pp. 149 et seq.

47 Md. 485; *Gray v. People*, 21 Hun, 140. Probably the most instructive case in arrest of judgment, aided by verdict, and the regard that is to be had to the substance rather than the form, is *Bayard v. Malcom*, 2 Johns. 550, 3 Am. Dec. 450. ¹ 1 Chitty Pl. 656; *Hitchcock v. Haight*, 2 Gilm. 604; *Rothchilds v. Bruscke*, 181 Ill. 265; *Aird v. Haynie*, 86 id. 173; *Roberts v. Dame*, 11 N. H. 220; *Buckley v. Duff*, 111 Pa. St. 223; *Adams v. Munten*, 74 Ala. 333.

issue joined is always some question raised between the parties and mutually referred by them to judicial decision; but that point may nevertheless, on examination, be found *not proper to decide the action*. For either of the parties may, from misapprehension of law or oversight, have passed over, without demurrer, a statement on the other side, insufficient and immaterial in law; and an issue in fact may have been ultimately joined on such immaterial statement; and so the issue will be immaterial, though the parties have made it the point in controversy between them. For example, if in an action of debt on bond, conditioned for the payment of ten pounds ten shillings at a certain day, the defendant pleads payment of *ten pounds*, according to the form of the condition, and the plaintiff, instead of demurring, tenders issue upon such payment, it is plain that, whether this issue be found for the plaintiff or the defendant, it will remain equally uncertain whether the plaintiff is entitled or not to maintain his action; for, in an action for the penalty of a bond conditioned to pay a certain sum, the only material question is whether the exact sum were paid or not, and a payment in part is a question quite beside the legal merits. (2) In such cases, therefore, the court, not knowing for whom to give judgment, will *award a repleader*, that is, will order the parties to plead *de novo*, for the purpose of obtaining a better issue. (k)¹

(1) *Kent v. Hall*, Hob. 118; and see another instance, *Plomer v. Ross*, 5 Taunt. 386.

(k) 2 Saund. 319 b, n. 6; Bac. Ab., Pleas, etc., M.; Com. Dig., Pleader, R. 18. See examples of cases in which a repleader has been awarded or refused. *Anon.*, 2 Vent. 196; *Enys v. Mohun*, 2 Str. 847; *Plomer v. Ross*, 5 Taunt. 386; *Clears v. Stevens*, 8 Taunt. 418; and the form of entering an award of repleader on record, Co. Ent. 677, 42, 151; *Jefferson v. Morton*, 2 Saund. 20.

¹ Mr. Chitty in his first edition says that the principal quality of an issue is that it must be upon a material point. An informal issue is when a material allegation is traversed in an improper or artificial manner. This (an informal issue) and other preceding mistakes can be aided by verdict under 32 Hen., ch. 30. But a verdict does not help an immaterial issue. 1 Chitty, Pl. (1st ed.) 631. In *Staples v. Hayden*, 2 Salk. 579, five rules as to repleader were laid down: (1) At common law a repleader was allowed before trial because the verdict did not cure an immaterial issue. But since the statute of jeofails a repleader ought not to be awarded till after verdict, because the error could be avoided by amendment. (2) Denial of repleader or erroneously granting it was ground for error. (3) Judgment was that the parties begin at the first fault (*quod partes replacitent*). 1 Ld. Raymond, 169. (4) No costs to be awarded either

5. *A venire facias de novo*, that is, a new writ of *venire facias*, will be awarded when, by reason of some irregularity or defect in the proceedings on the first *venire* or the trial, the proper effect of that writ has been frustrated or the verdict become void in law; as, for example, where the jury has been improperly chosen, or given an uncertain or ambiguous or defective verdict. The consequence and object of a new *venire* are of course to obtain a new trial; and, accordingly, this proceeding is in substance the same with a *motion for a new trial*. Where, however, the unsuccessful party objects to the verdict, in respect of some *irregularity or error in the practical course of proceeding* rather than on the merits, the form of the application is a motion for a *venire de novo*, and not for a new trial.

§ 96. *Other modes of trial*.—The proceedings relative to trial by jury having been now considered, (*l*) *the other modes of trial*, which (as has been already observed) (*m*) are of rare and limited application, may be dismissed in few words.

The trial by the grand assise is very similar to the common trial by jury. There is only one case in which it appears ever to have been applied, and there it is still in force. In a *writ of right*, if the defendant, by a particular form of plea appropriate to that purpose, (*n*) denied the right of the demandant as claimed, he had the option, till the recent abolition of the extravagant and barbarous method of the wager of battel, (*o*) of either *offering battel* or *putting himself on the grand assise* to try whether he or the demandant had "the greater right." The latter course he may still take; and, if he does, the court awards a writ for summoning four knights to make election

(*l*) See Appendix, note (34).

(*m*) *Supra*, p. 171.

(*n*) See the plea, 3 Chitty, 632.

(*o*) By Stat. 59 Geo. III., ch. 46.

party. (5) A repleader cannot be awarded after default, or generally after demurrer or writ of error, nor when the court may give judgment. Willea, 532. See *Stafford v. Mayor of Albany*, 6 Johns. 1; *Magouen v. Lapham*, 19 Pick. 419. It may be awarded after argument of demurrer. *Potter v. Titcomb*, 7 Greenl. 302.

The rules above stated bring out the important point, viz: The effect of the statute of amendments, and accounts for the fact that a repleader is seldom required in modern practice when amendments are made in form or substance before or after verdict. See App., Statute of Amendments, note 83.

of twenty other recognitors. These knights and twelve of the recognitors so elected, together making a jury of sixteen, constitute what is called the *grand assise*; and when assembled they proceed to try the issue or (as it is called in this case) the *mise* upon the question of right. The trial, as in the case of a common jury, may be either at bar or *nisi prius*; and if at *nisi prius*, a *nisi prius record* is made up; and the proceedings are in either case, in general, the same as above explained with respect to a common jury. (p)

Upon the issue or mise of right, the wager of battel, or the *grand assise*, was, till the abolition of the former,—and the latter still is,—the only legitimate method of trial; and the question cannot be tried by a jury in the common form. (q)

The trial by the record applies to cases where an issue of *nul tiel record* is joined in any action. If a record be asserted on one side to exist, and the opposite party deny its existence, under the form of traverse that *there is no such record* remaining in court as alleged, and issue be joined thereon, this is called an issue of *nul tiel record*; and the court awards in such case a trial by *inspection and examination of the record*. (r) Upon this, the party affirming its existence is bound to produce it in court on a day given for the purpose; and if he fail to do so judgment is given for his adversary. The trial by record is not only in use when an issue of this kind happens to arise for decision, but it is the only legitimate mode of trying such issue, and the parties cannot put themselves upon the country.¹

The trial by certificate is now of very rare occurrence, but is still in force upon certain issues, (s) of which the principal and most important is the issue of *ne unques accouple en loial matrimonie*. This arises in the *action of dower*, in which the tenant may plead in bar that the demandant “*was never accoupled to her alleged husband in lawful matrimony*.” Issue being joined upon this, the court awards that it be tried by

(p) See *Tysmen v. Clarke*, 3 Wils. 419, 541; *Hardman v. Clegg*, 1 Holt, N. P. R. 657; 3 Chitty, 635; 2 Saund. 45 e; 1 Arch. 402, for full information on the subject of trial by the grand assise.

(q) *Galton v. Harvey*, 1 Bos. & Pul. 192. See Appendix, note (35).

(r) See the form of the issue, 2 Chitty, 602.

(s) The kinds of issue on which this trial may occur are enumerated, 3 Bl. Com. 323.

the diocesan of the place where the parish church in which marriage is alleged to have been had is situate, and that the result be certified to them by the ordinary at a given day. (t) It is said that this is a form of issue which can arise *only* in dower. (u) The trial by certificate is, when competent, the *only legitimate mode*, and the issue cannot be tried by jury.

The *trial by witnesses* and that *by inspection* are in very few instances legally competent, and are not now known in practice.¹ It seems, however, that the former is still applicable (as anciently) to an issue *arising on the death of the husband in an action of dower*, (x) and in some other cases; and that the proof *by inspection* is also, in some instances, still admissible; for example, if in any action, upon a plea of *parol demurrer*, issue be taken on the non-age. (y) In case of trial *by witnesses*, the court, upon issue joined, awards that both parties produce in court, at a given day, their respective witnesses; on trial *by inspection*, that the subject to be inspected be brought into court; for example, that the guardian of the infant bring him into court on a certain day to be viewed. (z) In either case the judges examine and decide, and the judgment is pronounced accordingly. It is to be observed, however, with respect to trial *by inspection*, that, even when competent, it seems to be not a mode so exclusively appropriate but that the parties may, by consent, refer the questions to a jury; (a) and both with respect to this trial and that *by witnesses* it is laid down that if after the evidence the judges are still unable to satisfy themselves on the fact, they have, in general, a discretion then to send the parties *to the country*. (b)

The *trial by wager of law* has also fallen into complete disuse, but in point of law it seems to be still competent in most of the cases to which it anciently applied. The most important and best established of these cases is the issue of *nil debet*,

(t) See the form of the issue, 3 Chitty, 599; Co. Ent. 181, a.

(u) Bac. Ab., Bastardy, 516, cites 11 Hen. 4, 78.

(x) Abbot of Strata Mersella's Case, 9 Rep. 30, b; Faux v. Barnes, Lord Raym. 174.

(y) Vin. Ab., Trial (B. 2), 10, cites 20 Ass. 37; 19 E. 2.

(z) Vin. Ab., Trial (C.).

(a) Bac. Ab., tit. Infancy, L. 10, p. 634 (5th ed.).

(b) Vin. Ab., Trial, C. 9, 10; Bac. Ab., Trial, A. 2, 3; 3 Bl. Com. 333.

¹ See 3 Cooley's Black. (3d ed.) 336, mitting issues to the judge for trial note 2. The modern practice of sub- is upon the same principle.

arising in an action of *debt on simple contract*, or the issue of *non detinet* in an action of *detinue*. In the declaration in these actions, as in almost all others, the plaintiff concludes by offering *his suit* (of which the ancient meaning was *followers* or *witnesses*, though the words are now retained as a mere form), to prove the truth of his claim. On the other hand, if the defendant, by a plea of *nil debet* or *non detinet*, deny the debt or detention, he may conclude by offering to establish the truth of such plea "*against the plaintiff and his suit in such manner as the court shall direct.*" Upon this the court awards the *wager of law*; (c) and the form of this proceeding when so awarded is, that the defendant brings into court with him eleven of his neighbors, and for himself makes oath that he does not owe the debt or detain the property as alleged; and then the eleven also swear that they believe him to speak the truth; and the defendant is then entitled to judgment. (d)

It is to be observed with respect to this mode of trial, that though the defendant has thus the power of resorting to it, he is not *obliged* to do so. He is at liberty, if he pleases, to put himself *upon the country*; the trial by jury being a mode of decision always applicable to the same questions on which *law* may be *waged*, and the mode, in fact, always applied to them in the modern practice. (e)

§ 97. *The judgment.*—It has now been shown in what manner the issue, whether in law or fact, is decided. It has been explained, too, by what means the unsuccessful party may, upon an issue in fact, avoid in some cases, by motion in court the effect of the decision. Supposing, however, that such means are not adopted, or do not succeed, or that the issue be an issue in law, the next step is *the judgment*.

As the issue is the question which the parties themselves have, by their pleading, mutually selected for decision, they are in general considered as having *mutually put the fate of the cause upon that question*; and as soon, therefore, as the issue is decided in favor of one of them, that party in general becomes victor in the suit; and nothing remains but to award the judicial consequence which the law attaches to such suc-

(c) See the form of such issue and award of trial, Co. Ent. 119 a; Lil. Ent. 467; 3 Chitty, 479.

(d) 3 Bl. Com. 343. See Appendix, note (36).

(e) See Appendix, note (37).

cess. The award of this judicial consequence is called *the judgment*, and is the province of the judges of the court.

The nature of the judgment varies according to the nature of the action, the plea, the issue, and the manner and result of the decision.

It shall be first supposed that the issue is decided *for the plaintiff*.

In this case, if it be an issue in *law* arising on a *dilatory plea*, the judgment is only that the defendant *answer over*, (*f*) which is called a judgment of *respondeat ouster*.¹ The pleading is accordingly resumed, and the action proceeds. This judgment, therefore, does not fall within the definition of the term just given, but is of an anomalous kind. Upon all other issues in *law*, and, in general, all issues in *fact*, the judgment is *that the plaintiff do recover*, (*g*) which is called a judgment *quod recuperet*.² The nature of such judgment, more particularly considered, is as follows: It is of two kinds: *interlocutory*, and *final*. If the action *sound in damages* (according to the technical phrase), that is, be brought not for specific recovery of lands, goods or sums of money (as is the case in real and mixed actions, or the personal action of debt and detinue), but for *damages only*, as in covenant, trespass, etc.,—and if the issue be an issue in *law*, or any issue *in fact not tried by jury*, then the judgment is only that the *plaintiff ought to recover his damages*, without specifying their amount;³ for, as there has been no trial by jury in the case, the *amount* of damages is not yet ascertained. The judgment is then said to be *interlocutory*. On such interlocutory judgment the court does not, in general, itself undertake the office of assessing the dam-

(*f*) Bac. Ab., Pleas, etc., N. 4; 2 Arch. Pract. 3.

(*g*) Com. Dig., Abatement, I. 14, I. 15; 2 Arch. Pract. 3.

¹ Bradshaw v. Morehouse, 1 Gilm. Burr. 261, 1 Sm. Ld. Cas. 1405; Rex 395; Young v. Gilles, 118 Mass. 34; v. Gibbon, 8 East, 107, 1 Ld. Cr. Cas. Parks v. Smith, 155 id. 26; Walden 272. On issue joined on plea in abatement in action for a debt (sum certain) or for a specific thing, the

² Greer v. Young, 120 Ill. 184. See judgment is final. Steele v. G. T. Myers v. Erwin, 20 Ohio, 381, a valuable case upon the judgment, to which is added a valuable note by the reporter; Rice v. Shute, 2 386; Myers v. Erwin, 20 Ohio, 380.

³ Steele v. G. T. Ry., 20 Ill. App.

ages, but issues a *writ of inquiry*, directed to the sheriff of the county where the facts are alleged by the pleading to have occurred, commanding him to inquire into the amount of the damage sustained, "by the oath of twelve good and lawful men of his county," and to return such inquisition, when made, to the court. Upon the return of the inquisition, the plaintiff is entitled to another judgment, viz., *that he recover the amount of the damages so assessed*; and this is called *final* judgment. (h) But if the issue be in *fact*, and was *tried by a jury*, then the jury, at the same time that they tried the issue, assessed the damages. (i)¹ In this case, therefore, no writ of inquiry is necessary; and the judgment is final in the first instance, and to the same effect as just mentioned, viz., *that the plaintiff do recover the damages assessed*. Again, if the action do not *sound in damages*, the judgment is in this case also (in general), in the first instance, final; and to this effect, *that the plaintiff recover seisin of the land, etc., or recover the debt, etc.* But there is, besides this, in *mixed* actions, a judgment for *damages* also; and this is either given at the same time with that for recovery of seisin, if the damages have been assessed by a jury,—or, if not so assessed, a writ of inquiry issues, and a second judgment is given for the amount found by the inquisition. (k)

The issue shall next be supposed to be decided *for the defendant*.

In this case, if the issue, whether of fact or law, arise on a *dilatory plea*, the judgment is that the *writ* (or *bill*) *be quashed, quod breve* (or *billa*) *cassetur*, upon such pleas as are in abatement of the writ or bill,—and that *the pleading remain without day until, etc.*, (l) upon such pleas as are in *suspension* only;—the effect, in the first case, of course, being that the suit is defeated, but with liberty to the plaintiff to prosecute a better writ or bill; in the second, that the suit is suspended

(h) As to the proceedings on a writ of inquiry, see 2 Arch. Prac. 19.

(i) *Vide supra*, p. 174.

(k) 2 Saund. 44, n. 4; Booth, 19, 74, 75, 76.

(l) 8 Rep. 69; Reg. Pl. 180; 1 Chitty, 458; 2 Arch. Prac. 8.

¹ Goggin v. O'Donnell, 62 Ill. 66; v. Gilles, 113 Mass. 84; Simpson v. Metzger v. Huntington, 51 Ill. App. Railway Co., 89 Tenn. 304; Myers 377; Boggs v. Bindskoff, 23 Ill. 66; v. Erwin, 20 Ohio, 382, note; Rex v. Chase v. Deming, 42 N. H. 274; Young Gibson, 8 East, 107.

until the objection be removed. If the issue arise upon a *declaration* or *peremptory plea*, the judgment is, in general, *that the plaintiff take nothing by his writ* (or *bill*), and *that the defendant go thereof without day, etc.*, which is called a judgment of *nil capiat per breve*, or *per billam*.

What has been said as to the different forms of judgment relates to those on *direct* issues. Upon an issue of the *collateral* or *incidental* kind (*m*) (which is a case that does not occur in modern practice), the judgment is sometimes *respondet ouster*; in other cases, *quod recuperet*; but the law with respect to the judgment on issues of this kind does not seem to be, in every instance, clearly settled. (*n*)

Judgment has hitherto been supposed to be awarded only *upon the decision of an issue*. There are several cases, however, in which judgment may be given, though no issue have arisen; and these cases will now require notice. In the description given in this chapter of the manner of suit, it will be observed that the action has been uniformly supposed to *proceed to issue*; and this has been done to prevent digression and complexity. But an action may be cut off in its progress, and come to premature termination, by the fault of one of the parties in failing to pursue his litigation; and this may happen either with the intention of abandoning the claim or defense, or from failing to follow them up, within the periods which the practice of the court, in each particular case, prescribes. In such cases the opposite party becomes victor in the suit, as well as where an issue has been joined and is decided in his favor; and is at once entitled to judgment. Thus, in a real (though not in a personal) action, if *the defendant* holds out against the process, judgment may be given him for *default of appearance*. (*o*) So, in actions real, mixed, or personal, if, after appearance, he neither pleads nor demurs; or if, after plea, he fails to maintain his pleading till issue joined, by rejoinder, rebutter, etc., judgment will be given against him *for want of plea*; which is called judgment by *nil dicit*.¹ So if, instead of a plea, his attorney says he is

(*m*) *Vide supra*, p. 165.

(*n*) Co. Ent. 319; Com. Dig., Voucher (B. 2); 2 Saund. 44, n. 4; Bac. Ab., Pleas, etc., N. 4.

(*o*) Booth, 19, 78; Com. Dig., Pleader (Y. 1); 2 Saund. 43, n. 4.

¹ See *Kansas City Ry. v. Sanders*, 98 Ala. 293.

not informed of any answer to be given to the action, judgment will be given against him; and it is in that case called a judgment by *non sum informatus*. Again — instead of a plea, he may choose to *confess* the action; or, after pleading, he may, at any time before trial, both *confess* the action and *withdraw his plea or other allegations*; and the judgment against him, in these two cases, is called a judgment by *confession*, or by *confession relicta verificatione*. On the other hand, judgment may be given against the *plaintiff*, in any class of actions, for not declaring, or replying, or surrejoining, etc., or for not entering the issue; and these are called judgments of *non pros.* (from *non prosequitur*).¹ So, if he chooses, at any stage of the action, after appearance and before judgment, to say that he “will not farther prosecute his suit,” — or, that he “withdraws his suit,” — or (in case of plea in abatement) prays that his “writ” or “bill” “may be quashed, that he may sue or exhibit a better one,” — there is judgment against him of *nolle prosequi*, *retraxit*, or *cassetur breve*, or *billa*, in these cases respectively. Again, judgment of *nonsuit* may pass against the plaintiff, which happens when on trial by jury the plaintiff, on being called or demanded at the instance of the defendant to be present in court while the jury give their verdict, fails to make his appearance. In this case no verdict is given; but judgment of nonsuit passes against the plaintiff. So if, after issue is joined, the plaintiff neglects to bring such issue on to be tried in due time, as limited by the course and practice of the court in the particular case, judgment will also be given against him for this default; and it is called judgment *as in case of nonsuit*.

These judgments by default, confession, etc., when given for the *plaintiff*, are generally *quod recuperet*; and may be either *interlocutory* or *final*, according to a distinction already explained. For the *defendant* the form generally is *nil capiat*.²

¹ See 8 Cooley's Black. (3d. ed.) 296.

² State v. Peck, 60 Me. 498, Ames' Cases, 19. See *ante*, p. 192. Judgments by default or *nil dicit* at law are interlocutory in all cases when damages are to be awarded. The de-

murrer or default only confesses that the plaintiff has a cause of action for some amount. C. & R. I. Ry. v. Ward, 16 Ill. 522. But on the inquiry of damages the defendant may introduce evidence as to damages. Bridges

Upon judgment in most personal and mixed actions, whether upon issue or by default, confession, etc., it will be observed that it forms part of the adjudication that the plaintiff or defendant *recover his costs* of suit or defense; which costs are taxed by an officer of the court at the time when the judgment is given.

There is generally an addition, too — when the judgment is for the *plaintiff*, — that the defendant “*be in mercy*” (*in misericordia*); that is, be *amerced* or fined for his delay of justice; when for the *defendant*, that the plaintiff be *in mercy* for his false claim. (*p*) The practice, however, of imposing any actual amercement has been long quite obsolete.

Judgments (like the pleadings) were formerly pronounced in *open court*; and are still always *supposed* to be so. But, by a relaxation of practice, there is now in general, except in the case of an issue in law, no actual delivery of judgment, either in court or elsewhere. The plaintiff or defendant, when the cause is in such a state that, by the course of practice, he is entitled to judgment, obtains the signature or allowance of the proper officer of the court, expressing, generally, that judgment is given in his favor; and this is called *signing judgment*, and stands in the place of its actual delivery by the judges themselves. (*q*)

Regularly the next proceeding is *to enter the judgment on record*. Where it has been signed after *trial* or *demurrer*, it will be remembered that the proceedings up to the time of issue and the award of venire, or the continuance by *curia advisari vult*, have already been recorded. (*r*) It will remain,

(*p*) As to this amercement, see Griesley's Case, 8 Rep. 39, 59.

(*q*) “The *signing* of the judgment is but the leave of the master of the office for the attorney to *enter* the judgment for his client.” Styles, Pract. Reg., tit. Judgment. On judgments by *nil dicit*, in the king's bench and common pleas, the way of signing judgment is to make an *incipitur* of the declaration on stamped paper, and get it signed by the clerk of the judgments in the king's bench; and in the common pleas, at the prothonotaries' office. 2 Arch. Pract., p. 10; Impey, C. P. 453. On judgments after verdict in the king's bench, the master signs the *postea* in taxing costs; and this is the signing of judgment. 1 Manning's Exchequer, 352, note (c).

(*r*) But see *supra*, p. 168, note *y*, as to the actual practice with respect to issues in *fact* in most cases of making an *incipitur* only.

v. Stephens, 10 Brad. 369; *Briggs v. chancery* were adopted from the common law. *Thompson v. Worster*, 114 Smith, 95 Ill. 328; *C. & St. L. Ry. U. S.* 109; *Cains v. Fisher*, 1 Johns. v. Holbrook, 72 id. 419. Defaults in Ch. 8. See *post*, 335.

however, to enter the subsequent proceedings to the judgment inclusive, which is called *entering the judgment*. This is done by drawing them up with continuances, etc., on the same roll on which the issue was entered by way of continuation or farther narrative of the proceedings there already recorded; and the judgment is entered in such form as the attorney for the successful party conceives to be legally appropriate to the particular case, supposing that it were actually pronounced by the court. The roll when complete by the entry of final judgment is no longer called the issue roll, but has the name of the *judgment roll*, ^(s) and is deposited and filed of record in the treasury of the court. It is believed, however, that this whole proceeding of entering the judgment on record is in practice usually *neglected*. Yet there are several cases in which, by the practice of the court, it becomes essential after final judgment to do so, and in which it is therefore actually done. ^(t)

When judgment is signed, not after trial or demurrer, but as by *default, confession, etc.*, there having been no issue roll yet made up, the whole proceedings to the judgment inclusive are to be entered for the first time on record. This is accordingly done by the attorney upon a parchment roll, and upon the same principles as to the form of entry that have been already stated with respect to recording the issue and judgment thereon. ^(u)

Of the form of entry after judgment upon issues both in *law* and *fact*, and also after judgment by *default*, the following are examples:

ENTRY OF JUDGMENT.

For the Defendant.

Upon the issue in law, supra, p. 169.

[*After the entry of the issue, as in p. 169, the proceedings are to be continued on the roll, as follows:*]

At which day, before our said lord the king, at Westminster, come the parties aforesaid, by their respective attorneys afore-

^(s) 2 Arch. Pract. 206.

^(t) See these cases enumerated, 2 Arch. Pract. 206.

^(u) However, instead of pursuing this, the strict and regular course, the usual practice is only to enter an *incipitur* on the roll, as in the case of entering an issue in fact. *Vide supra*, p. 163, and note *y*; 1 Sel. Pract. 342; 2 Arch. Pract. 10.

said. Whereupon, all and singular the premises being seen, by the court of our said lord the king now here fully understood, and mature deliberation being thereupon had, it appears to the said court here, that the replication aforesaid and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient, in law, for the said A. B. to have or maintain his aforesaid action against the said C. D. Therefore it is considered that the said A. B. take nothing by his said writ, but that he, and his pledges to prosecute, be in mercy, (x) and that the said C. D. do go thereof without day, etc. And it is further considered by his majesty's court here, that the said C. D. do recover against the said A. B. — pounds, for his costs and charges by him laid out about his defense in this behalf, by the court of our said lord the king now here, adjudged to the said C. D., and with his assent, according to the form of the statute in such case made and provided; and that the said C. D. have execution thereof, etc. (y)

ENTRY OF JUDGMENT.

For the Plaintiff.

Upon the issue in fact, supra, p. 170; after trial by jury in London.

[After the entry of the issue as in p. 170, the proceedings are to be continued on the roll as follows:]

Afterwards the process thereof is continued between the parties aforesaid of the plea aforesaid, by the jury being respited between them, before our said lord the king at Westminster, until —, wheresoever our said lord the king shall then be in England, unless the Right Honorable Sir Charles Abbott, knight, his majesty's chief justice, assigned to hold pleas in the court of our said lord the king, before the king himself, shall first come on —, the — day of —, at the guildhall of the city of London, according to the form of the statute in such case made and provided, by reason of the default of the jurors, because none of them did appear. (z) At which day, before our said lord the king at Westminster aforesaid, come the said parties aforesaid, by their attorneys aforesaid. And the said chief justice, before whom the said issue was tried, hath sent hither his record had before him, in these words, to wit: (a) Afterwards, that is to say, on the day and at the place within contained, before the Right Honorable Sir Charles Abbott, the chief justice within mentioned (etc., as

(x) *Vide supra* as to mercy, p. 196.

(y) Tidd's Appendix, ch. xxxix.

(z) This commencement of the entry refers to the award of the *distringas*; as to which see *supra*, p. 172.

(a) This is a transcript of the *postea* from the back of the *nisi prius* record. As to the *postea*, vide *supra*, p. 177.

in the postea, supra, p. 177, to the words "forty shillings"). Therefore it is considered that the said A. B. do recover against the said C. D. the damages, costs and charges by the said jury in form aforesaid assessed, and also — pounds for his costs and charges, by the court of our said lord the king now here adjudged of increase to the said A. B., and with his assent; which said damages, costs and charges, in the whole, amount to — pounds. And the said C. D. in mercy, etc. (b)

ENTRY OF JUDGMENT.

For the Plaintiff, on Nil Dicit.

Upon the declaration in covenant, supra, p. 115.

As yet of — Term, in the — year of the reign of King George the Fourth. Witness, Sir Charles Abbott, Knight.

— to wit, A. B. puts in his place E. F., his attorney, against C. D., in a plea of breach of covenant.

— to wit, C. D. puts in his place G. H., his attorney, at the suit of the said A. B., in the plea aforesaid.

— to wit, C. D. was summoned to answer (etc., *as in the declaration, supra*, p. 115).

And the said C. D., by — —, his attorney, comes and defends the wrong and injury when, etc., and says nothing in bar or preclusion of the said action of the said A. B.; whereby the said A. B. remains therein undefended against the said C. D. Wherefore the said A. B. ought to recover against the said C. D. his damages on occasion of the premises. But because it is unknown to the court of our said lord the king, now here, what damages the said A. B. hath sustained by reason of the premises, the sheriffs are commanded (c) that, by the oath of twelve good and lawful men of their bailiwick, they diligently inquire what damages the said A. B. hath sustained as well by reason of the premises, as for his costs and charges by him about his suit in this behalf expended; and that they send the inquisition which they shall thereupon take, to our said lord the king, on —, wheresoever our said lord the king shall then be in England, under their seal, and the seals of those by whose oath they shall take that inquisition, together with the writ of our said lord the king to them thereupon directed. The same day is given to the said A. B., at the same place. At which day, before our said lord the king at Westminster, comes the said A. B., by his attorney aforesaid. And the sheriffs of London, to wit, — —, esquire, and — —, esquire, now here, return a certain inquisition indented, taken before them at the guildhall of the

(b) Tidd's Appendix, ch. xxxix; 3 Bl. Com., Appendix, No. II.; 5 Went. 52.

(c) This is the award of the writ of inquiry, as to which, *vide supra*, p. 194.

city of London, in the parish of —, in the ward of —, in the same city, on the — day of —, in the — year of the reign of our said lord the king, by the oath of twelve good and lawful men of their bailiwick; by which it is found that the said A. B. hath sustained damages by means of the premises to fifty pounds, over and above his costs and charges, by him about his suit in this behalf expended, and for those costs and charges to forty shillings. Therefore it is considered that the said A. B. do recover against the said C. D. his damages aforesaid, by the said inquisition above found, and also — pounds, for his said costs and charges, by the court of our said lord the king now here adjudged, of increase, to the said A. B., and with his assent; which said damages, costs and charges, in the whole, amount to — pounds. And the said C. D. in mercy, etc. (*d*)

The course of the action, till the entry on record of the final judgment, has now been described; but the reader will not have a complete view of the history of a suit without taking some notice of two other subsequent proceedings. These are, the *writ of execution* and the *writ of error*.

§ 98. Writs of execution.— Upon judgment the successful party is, in general, entitled to *execution*, to put in force the sentence that the law has given. For this purpose he sues out a writ, addressed to the sheriff, commanding him, according to the nature of the case, either to give the plaintiff possession of the lands, or to enforce the delivery of the chattel which was the subject of the action, or to levy for plaintiff the debt or damages, and costs recovered; or to levy for the defendant his costs; and that either upon the body of the opposite party, his lands or goods, or, in some cases, upon his body, lands and goods; the extent and manner of the execution directed always depending upon the nature of the judgment. (*e*) Like the judgment, writs of execution are *supposed* to be actually awarded by the judges in court; but no such award is in general actually made. The attorney, after signing final judgment, sues out of the proper office a writ of execution, in the form to which he conceives he would be entitled, upon such judgment *as he has entered*, if such entry has been actually made,—and if not made, then upon such *as he thinks he is entitled to enter*; and he does this (of course) upon

(*d*) Tidd's Appendix, ch. xxxix; 1 Went., p. 244.

(*e*) For further information on this subject, see 3 Bl. Com. 413.

peril that, if he takes a wrong execution, the proceeding will be illegal and void, and the opposite party entitled to redress.

§ 99. Writs of error.— After final judgment is signed the unsuccessful party may bring a *writ of error*,¹ and this, if obtained and *allowed* before execution, suspends the latter proceeding till the former is determined. (f) A writ of error, like an original writ, is sued out of *chancery*, directed to the judges of the court in which judgment was given, and commanding them, in some cases, themselves to examine the record; in others to send it to another court of appellate jurisdiction to be examined, in order that some alleged error in the proceedings may be corrected. The first form of writ — called a writ of error *coram nobis* [or *vobis*] (g) — is where the alleged error consists of matter of *fact*; the second — called a writ of error, generally — where it consists of matter of *law*.²

In this case the writ of error was granted by the court.

issued from trial court

issued from some other court

When a writ of error is obtained, the whole proceedings, to final judgment inclusive, are then always *actually entered* (if this has not before been done) on record; and the object of the writ of error is to reverse the judgment for some *error of fact* or *law* that is supposed to exist in the proceedings *as so recorded*.³ It will be proper here to explain in what such error may consist.

(f) As to the allowance of a writ of error, see 2 Tidd, 1044 (4th ed.).

(g) As to these terms, vide 2 Tidd, 1032 (4th ed.).

¹ A writ of error was formerly an original writ issuing out of chancery, but in modern practice it is a judicial writ sued out of the appellate tribunal, and is an entirely new writ; it does not *per se* affect the judgment which may be executed while the writ of error is pending, unless a *supersedeas* issues to stay proceedings. *Suydam v. Williamson*, 20 How. 437; *Yates v. People*, 9 Johns. 396, 6 Am. Dec. 290, Great Op. by Great Judges, 201. It is a writ of right. *McClay v. Norris*, 4 Gilm. 370; *Haines v. People*, 97 Ill. 161. A writ of error has been defined to be a commission by which the judges of the court are authorized to examine a

record upon which a judgment was given in another court, and on such examination to affirm or reverse the same according to law. *Cohens v. Virginia*, 6 Wheat. 264. It was not the proper remedy to review the facts. *Genes v. Campbell*, 11 Wall. 193.

² Writs of error to remove a judgment to the supreme court of the United States are, under act of congress, governed by the principles and usages of common law. *Payne v. Niles*, 20 How. 219.

³ *Richardson's Ex'r v. Jones*, 12 Gratt. 53; *Bronson v. Schulton*, 104 U. S. 410; *Hillman v. Chester*, 12 Heisk. 34. Judge Clifford says: "It is laid down by the best writers on

of the record, the judges appear to have committed a mistake *in law*. This may be by having *wrongly decided an issue in law* brought before them by demurrer; but it may also happen in other ways. As formerly stated, (*k*) the judgment will, in general, follow success in the issue. It is, however, a principle necessary to be understood, in order to have a right apprehension of the nature of writs of error, that the judges are, in contemplation of law, bound, before in any case they give judgment, *to examine the whole record*;¹ and then to adjudge either for the plaintiff or defendant, according to the

(*k*) *Supra*, pp. 191, 192.

common pleas, because the record is stated to remain before us (the king) if in the former, and before you (the judges) if in the latter. Cooley's Black. (3d ed.) 406. There is, therefore, in this country, properly speaking, no such thing as a writ of error *coram nobis*; and in England the writ may be said to be obsolete. *Camp v. Bennett*, 16 Wend. 48. But though in this country the name of the writ be lost (*Smith v. Kingsley*, 19 Wend. 620), the writ itself is by no means obsolete, though generally it has been superseded by motion. See Freeman on Judgments, § 94; *McKindley v. Buck*, 43 Ill. 488; *Jeffrey v. Fitch*, 46 Conn. 601; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48; *Dows v. Harper*, 6 Ohio, 518, 24 Am. Dec. 270; *Beaubien v. Hamilton*, 4 Ill. 213; *State v. Calhoun*, 50 Kan. 523, 18 L. R. A. 838, n.

That this writ will reach errors of fact only, see *Hawkins v. Bowie*, 9 Gill & J. 428; *Roughton v. Browne*, 58 N. C. 393; *Dinsmore v. Boyd*, 6 Lea, 689. For cases in which the writ has been used, see *Latshaw v. McNees*, 50 Mo. 381; *Wood v. Colwell*, 84 Pa. 92; *Ex parte Toney*, 11 Mo. 661; *Mills v. Alexander*, 21 Tex.

151; *Giddings v. Steele*, 28 id. 732, 91 Am. Dec. 836.

Audita querela is a writ to prevent or recall an execution, which has been rarely used either in England or in this country. Unlike *coram nobis*, it may be sustained upon some ground which occurred after the rendition of the judgment, which, therefore, the defendant had no opportunity to plead. 3 Cooley's Black. (3d ed.) 404; *Thatcher v. Gammon*, 12 Mass. 268; *Steele v. Boyd*, 6 Leigh, 547, 29 Am. Dec. 218; *Longworth v. Screven*, 2 Hill (S. C.), 298, 27 Am. Dec. 381. It is proper and customary to proceed by motion in cases where the party would have been entitled to *audita querela*. *Smock v. Dade*, 5 Rand. 639, 16 Am. Dec. 780; *Staniford v. Barry*, 1 Aik. 321, 15 Am. Dec. 692, and notes, citing *McDonald v. Falvey*, 18 Wis. 571; *Dunlap v. Clements*, 18 Ala. 778; *Gleason v. Peck*, 12 Vt. 56; *Bryant v. Johnson*, 24 Me. 304; *Wetmore v. Law*, 34 Barb. 517; *Fox v. Witham*, 9 Allen, 572; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421.

¹ *Suydam v. Williamson*, 20 How. 433; *Bank of United States v. Smith*, 11 Wheat. 171; *Curtiss, J., dissenting*, in *Scott v. Sanford*, 19 How. 393.

legal right, as it may on the whole appear — notwithstanding or without regard to the issue in law or fact that may have been raised and decided between the parties; and this because the pleader may, from misapprehension, have passed by a material question of law without taking issue upon it. Therefore, whenever, *upon examination of the whole record*, right appears, on the whole, not to have been done, and *judgment appears to have been given for one of the parties when it should have been given for the other*, this will be *error in law*. And it will be equally error whether the question was raised on *demurrer*, or the issue was an issue in *fact*, or there was *no issue*; judgment having been taken by default, confession, etc. In all these cases, indeed, except the first, the judges have *really* committed no error; for it may be collected from preceding explanations, that no record, or even copy of the proceedings, is actually brought before them except upon demurrer; but with respect to a writ of error, the effect is the same as if the proceedings had all actually taken place and been recorded in open court according to the fiction and supposition in law. So, on the same principle, there will be error in law if *judgment has been entered in a wrong form* inappropriate to the case; although, as we have seen, the judges have in practice nothing to do with the entry on the roll. But on the other hand, nothing will be error in law that does not appear *on the face of the record*; for matters not so appearing are not supposed to have entered into the consideration of the judges. (l) Upon error in *law*, the remedy is not by writ of error *coram nobis* (for that would be merely to make the same judges reconsider their own judgment), but by a writ of error requiring the record to be sent into some other court of appellate jurisdiction that the error may be there corrected, and called a writ of error generally.

With respect to the writ of error of this latter description, it is farther to be observed that it cannot be supported unless the error in law be of a *substantial kind*. For as, by the effect of the statutes of amendments and jeofails, errors of *mere form* are no ground for *arresting the judgment*, (m) so, by the effect of the same statutes, such objections are now insufficient

(l) 2 Inst. 426.

(m) *Supra*, p. 185.

to found a *writ of error*; though at common law the case was otherwise. (n)¹

When, on the ground of some error in law, the record is removed by writ of error, the following is the course of appeal among the different courts: From the common pleas the record may be removed into the court of king's bench, and from thence, by a new writ of error, into the house of lords; from the exchequer, into the court of exchequer chamber, held before the lord chancellor, lord treasurer and the judges of the court of king's bench and common pleas, and from thence into the house of lords; from the king's bench, in proceedings by bill, in most of the usual actions, into the court of exchequer chamber, held before the judges of the common pleas, and barons of the exchequer, and from thence into the

(n) On this subject, *vide* 3 Bl. Com. 406, 7.

¹ *Motions to strike*: Another incident of the trial not noticed by the author, in common use at the present time, is the motion to strike pleading from the files or to strike out parts of pleadings. Pleas merely to the damages (*Dermick v. Chapman*, 11 Johns. 132; *Laramore v. Wells*, 29 Ohio St. 13; *Millard v. Thorn*, 56 N. Y. 405); pleas containing mere evidence (*Bowen v. Aubry*, 22 Cal. 566; *McAlister v. Kuhn*, 6 Otto, 87), argumentative pleas, or irrelevant pleas, may in the discretion of the court be stricken out (*Salt Lake City Nat. Bank v. Hendrickson*, 11 Vroom, 52; *Buell v. Lake*, 8 Ia. 551). Pleas improper in point of time (*Price v. Sinclair*, 18 Miss. 254; *Taylor v. Hall*, 20 Tex. 211); false pleas, or those imputing improper action to the court (*Middleton v. Ames*, 7 Vt. 168; *Stewart v. Hotchkiss*, 2 Cow. 684), may also be stricken out. A plea which is entirely improper in the particular case, or one amounting to the general issue (*Wilkinson v. Mosley*, 30 Ala. 562; *Ill. Cent. Ry. v. Johnson*, 34 Ill. 389), may be stricken out. The above are but a few cases

selected from a large number found in an excellent note to *Best's Right to Begin and Reply*, § 73, p. 128, an excellent work.

If repugnant pleas are filed, one should be stricken out, and by this remedy the court may control the right to file several pleas. *Jackson v. Stetson*, 15 Mass. 48. A plea amounting to the general issue may be stricken out. *Jackson v. Hobson*, 4 Scam. 418. When two pleas are filed presenting the same defense, both good, one may be stricken out on motion. *Ringhouse v. Keener*, 63 Ill. 230; *Parkes v. Holmes*, 22 id. 522.

That a pleading is defective is no ground of itself for a motion to strike; the plea must in some manner be improper. If improper, it may still be stricken from the files, though the facts set up show a good defense. *Bemis v. Homer*, 145 Ill. 567.

A motion is not a proper remedy to raise facts *dehors* the record, to affect matters which are dilatory. The party cannot escape the risk incident to dilatory pleas by motion. *Greer v. Young*, 120 Ill. 184.

house of lords; in proceedings by original, into the house of lords in the first instance. (o)

By what course of proceeding the error in the record is discussed and corrected in the appellate court, and the judgment reversed or affirmed, it is not material to the purpose of the present treatise to explain. The reader who wishes for information on that subject may be referred generally to the many valuable books of practice. (p)¹

(o) 3 Bl. Com. 411.

(p) *Vide* 2 Tidd, ch. xliii, etc.

¹ *As to the disposal of case on appeal*: The case may be affirmed, or affirmed in part and reversed in part, or it may be reversed and remanded for another hearing or for further proceedings (Garland v. Davis, 4 How. 131); or reversed simply (Swarington v. Pendleton, 4 S. & R. 389); or a new judgment may be entered (Pain v.

Cowdin, 17 Pick. 142; Union Nat. Bank v. Manistee Lumber Co., 43 Ill. App. 525; Mueller v. U. S. Mutual Ins. Co., 51 Ill. App. 40; Columbus, P. & I. R. Co. v. Simpson, 5 Ohio St. 251).

For full treatment of this subject, see Powell's Appellate Procedure and Elliott's Appellate Procedure, ch. 29.

PART III.

**RULES GOVERNING THE FRAMING OF ALLEGATIONS
AND PRODUCTION OF AN ISSUE.**

CHAPTER IV.

(ORIGINAL CHAPTER II.)

OF THE PRINCIPAL RULES OF PLEADING.

§ 100. **The object of pleading.**—The account of the course of an action being now concluded, and a view thus obtained of the general form and manner of pleading, and its connection with other parts of the suit, it is next proposed to investigate its principal or fundamental rules, and to explain their scope and tendency as parts of an entire system. For this purpose some observations shall be premised, relative to the manner in which that system was formed and the objects which it contemplates.

The manner of allegation in our courts may be said to have been first methodically formed and cultivated as a science in the reign of Edward I. From this time the judges began systematically to prescribe and enforce certain *rules of statements*, of which some had been established at periods considerably more remote, and others apparently were then, from time to time, first introduced. (a)¹ None of them seem to have been originally of legislative enactment, or to have had

(a) See Appendix, note (35).

¹ In his preface the author points out that he was the first to develop systematically the principles of the science of pleading. He mentions the great merit of Mr. Chitty's work, and distinguishes between his plan and the plan of this work; and while it is a very natural fact, it is none the less to be noticed, that while the work of Chitty finds its most useful field in those jurisdictions where a resemblance to the English forms of action is retained, the work of Stephen is accepted and held of as high authority in a code state as elsewhere. The reason is plain. Mr. Chitty explained rules of pleading as applied to particular forms of action; our author took a broader view of the rules to be observed in framing allegations, irrespective of the forms of action or particular pleading. It is therefore entirely consistent with the claim of those who advocated the reform procedure that they accept and apply the rules of Stephen, depending, as they do, not upon the form of action, but upon the nature of facts to be alleged. "It is assumed," says Professor Bliss, "that the student is familiar with the common-law system of law and equity pleading. If not, he is groping in the dark." Bliss' Code Pl., § 141. It

any authority except usage or judicial regulation; but, from the general perception of their wisdom and utility, they acquired the character of fixed and positive institutions, and grew up into an entire and connected *system of pleading*. This system, which, in its essential parts, still remains in practice unaltered, appears to have been originally devised in a view to certain objects or results, which it will be necessary, to the right apprehension of the subject of this chapter, here to explain.

The pleadings (as appears in the preceding chapter) are so conducted as always to evolve some question either of fact or law, disputed between the parties, and mutually proposed and accepted by them as the subject for decision, and the question so produced is called *the issue*. (b)¹

As the object of all pleading or judicial allegation is to ascertain the subject for decision, so the main object of that system of pleading established in the common law of England is to ascertain it by the production of an *issue*.² And this appears to be peculiar to that system. To the best of the author's information, at least, it is unknown in the present practice of any other plan of judicature. In all courts, indeed, the particular subject for decision must, of course, be in some manner developed before the decision can take place; but the methods generally adopted for this purpose differ widely from that which belongs to the English law.

(b) See Appendix, note (39).

was in reference to these rules, as afterward developed by our author, that Kent, C. J., said: "I entertain a decided opinion that the established principles of pleading, which compose what is called its science, are rational, concise, luminous and admirably adapted to the investigation of truth, and ought consequently to be very cautiously touched by the hand of innovation." Bayard v. Malcomb, 1 Johns. 458-71.

The language of the prevailing opinions, in the court of errors where the judgment of Judge Kent in the above case is reversed, is most in-

structive as to the regard which is to be paid to substance rather than form. Bayard v. Malcomb, 2 Johns. 550, 8 Am. Dec. 450.

¹ Munday v. Vail, 84 N. J. L. 418; Reynolds v. Stockton, 140 U. S. 256; Waterman v. Lawrence, 19 Cal. 210; Simonton v. Winters, 5 Pet. 141; Maguire v. Tyler, 47 Mo. 115; Anderson v. Oscamp (Ind., 1898), 85 N. E. Rep. 707; Maxwell's Code Pl. 1.

² Cook v. Scott, 1 Gilm. 838; Bayard v. Malcomb, 2 John. 550; Supervisors of Kewaunee Co. v. Decker, 80 Wis. 624; McFaul v. Ramsay, 20 How. 523.

By the general course of all other judicatures, the parties are allowed to make their statements *at large* (as it may be called), and with no view to the extrication of the precise question in controversy; and it consequently becomes necessary, before the court can proceed to *decision*, to review, collate and consider the opposed effect of the different statements when completed on either side,—to distinguish and extract the points mutually admitted, and those which, though undisputed, are immaterial to the cause,—and thus, by throwing off all unnecessary matter, to arrive at length at the required selection of the point to be decided. This retrospective development is, by the practice of most courts, privately made by each of the parties for himself, as a necessary medium to the preparation and adjustment of his *proofs*; and is also afterwards virtually effected by the judge in the discharge of his general duty of *decision*; while in some other styles of proceeding the course is different; the point for decision being selected from the pleadings by an act of the court, or its officer, and judicially promulgated prior to the proof or trial.¹ The common law of England differs (it will be observed) from both methods, by obliging the parties to come to issue; that is, so to plead as to develop some question (or issue) *by the effect of their own allegations*, and to *agree upon this question as the point for decision* in the cause; thus rendering unnecessary any retrospective operation on the pleadings for the purpose of ascertaining the matter in controversy.

§ 101. The origin of coming to an issue.—The author is of opinion that this peculiarity of coming to issue took its rise in the practice of *oral* pleading. It seems a natural incident of that practice to compel the pleaders to short and terse allegations, applying to each other by way of answer, in somewhat of a logical form, and at length reducing the controversy to a precise point. For while the pleading was *merely* oral, and not committed by any contemporaneous record to writing (a state of things which may be distinctly traced, among the yet extant archives of the early continental jurisprudence), the court and the pleaders would have to rely exclusively on their memory for retaining the tenor of the

¹ Langdell's Sum. Eq. Pl., § 41. See, also, App., n. 54.

discussion; and the development of some precise question or issue would then be a very convenient practice, because it would prevent the necessity of reviewing the different statements, and leave no burthen on the memory but that of retaining the question itself so developed. And even after the practice of recording was introduced, the same brief and logical forms of allegation would naturally continue to be acceptable, while the pleadings were still *viva voce*, and committed to record on the inconvenient plan of contemporary transcription. (*d*)

A co-operative reason for coming to issue was the variety of the modes of decision which the law assigned to different kinds of question. The various modes enumerated in the first chapter, as still recognized in practice, were, in the days of oral pleading, in full vigor and observance, and evidently made it necessary to settle publicly between the parties the precise point on which their controversy turned. For on the nature of this depended the very manner of the subsequent decision, and the form of proceeding to be instituted for that purpose. As questions of law were decided by the *court*, and matters of fact referred to other kinds of investigation, it was, in the first place, necessary to settle whether the question in the cause or issue was a matter of *law* or *fact*. Again, if it happened to be a matter of fact, it required to be developed in a form sufficiently specific to show what was the method of trial appropriate to the case. And unless the state of the question were thus adjusted between the parties, it is evident that they would not have known whether they were to put themselves on the judgment of the court or to go to trial; nor, in the latter case, whether they were to prepare themselves for trial by jury, or for one of the other various modes of deciding matter of fact.

To the opinion that this distinctive feature of the English pleading was derived from the practice of oral allegation, and from that of applying different forms of trial to the determination of different kinds of question, it may, perhaps, be objected that both these practices anciently prevailed not only in England but among the continental nations; among whom, nevertheless, the method of coming to issue is now

(*d*) See Appendix, note (40).

unknown. This objection, however, is capable of a satisfactory answer. On the continent the ancient system of judicature, of which these practices formed a part, was, at early periods, supplanted by the methods of the *civil law*, in which the pleadings were *written*, (e) and there was but *one form of trial*, viz., a trial by the judge himself, upon examination of instruments and witnesses adduced in evidence before him. (f) On the other hand, in the courts of Westminster, the law of trial still remains almost without a change; and with respect to oral pleading, though it at length grew out of fashion there, it gave place, not to allegations formed upon the principles of the imperial practice, but to supposed transcriptions from the record, the effect of which (as explained in the first chapter) has been to preserve, in these written pleadings, the style and method of those which were delivered *viva voce* at the bar of the court.

But whatever may be the origin and reason of the method of coming to issue, it is at least certain that that method has been substantially practiced in the English pleading from the earliest period to which any of the now existing sources of information refer; and from the work of Glanville on the Laws of England, it may clearly be shown to have existed, in effect, in the reign of Henry II. The term itself, of "*issue*,"¹ though perhaps somewhat less ancient, yet occurs as early as the commencement of the year-books; (h) and from the same period, at least, if not an earlier one, the production of the issue has been not only the constant effect, but the professed aim and object of pleading.

§ 102. Singleness of issues.—It was not, however, the *only* object. It was found that though the parties should arrive at an issue, that is, at some point affirmed on one side and denied on the other, and mutually proposed and accepted by them as the subject for decision, it might yet happen that the point was *immaterial*; that is, *unfit to decide the action*. This, of course, rendered the issue useless. When it occurred, the

(e) See Appendix, note (41).

(f) Fortescue de laud., ch. 20.

(h) See Appendix, note (42).

¹ *Simonton v. Winter*, 5 Pet. 149; *Eberhardt v. Sanger*, 51 Wis. 72; *Have-lock v. Rockwood*, 8 Term, 278.

proper remedy, as in the practice of the present day, was a *repleader*.¹ But it was also naturally an object to avoid its occurrence, and so to direct the pleadings as to secure the production, not only of an issue, but a *material* one.

Again, it was found to be in the nature of many controversies to admit of *more than one* question fit to decide the action; or in other words, actions would often tend to more than one material issue. This might happen, in the first place, in causes which involved *several distinct claims*. Thus, if an action be brought, founded on two separate demands, for example, two bonds executed by the defendant in favor of the plaintiff, the issue may arise as to one of them whether it be not discharged by a subsequent release; as to the other, whether it were not executed under duress of imprisonment, which would make it voidable in law. So there may be more than one material issue in causes which involve only a *single claim*.² Thus, in an action brought upon one bond only, two issues of the same kind may arise, viz., whether it were not executed under duress of imprisonment, or whether, at any rate, it were not, after its execution, released by the plaintiff. In the case of *several* claims, justice clearly requires that if the cause tend to several issues distinctly applicable to each, these several issues should all be raised and decided; for otherwise there would be no determination of the whole matters in demand. But in the case of a *single* claim the same consideration does not apply; for the decision of any one of the material issues that may arise upon it will be sufficient to dispose of the entire claim. Thus, in the first example given, the finding that one bond was released, or that it was not released, would leave the demand on the other wholly untouched. On the other hand, in the second example, if the party be put to his election either to rely on the fact of the execution under duress or on the release, either of the questions which he so elects will lead to an issue suffi-

¹ See Repleader, *supra*.

² It is quite evident that there is a misapprehension among code writers as to the idea of the singleness of issue sought. Thus it is said, "It is the boast of the common-law pleaders that their system reduces the contro-

very to a single issue." Bliss' Code Pl., § 142. This idea is contrary to that expressed by the text. A cause may have several issues, but each issue must be single. *Clearwater v. Meredith*, 1 Wall. 26.

cient to decide the whole claim. While several issues, therefore, must of necessity be allowed in respect of *several subjects of suit*, the allowance of more than one issue in respect of *each subject of suit* is, in some degree, a question of expediency.¹ Those who founded the system of pleading took the course of not allowing more than one, and the motives which led to this course are sufficiently obvious. For reasons assigned in another place, it was of considerable importance to the judges in those remote times, when the contention was conducted orally, to simplify and abbreviate the process as much as possible; and it was in this view, no doubt, that it was found expedient to establish the principle of confining the pleaders to a *single* issue in respect of each single claim, allowing, at the same time, from necessity, of several issues, when each related to a distinct subject of demand. But whatever the reason, it is clear that in point of fact this principle was very early recognized in pleading, and that the issue was required not only to be *material* but *single*.

§ 103. *Certainty of the issue.*—There was still another quality essential to the issue—that of *certainty*. This word is technically used in pleading, in the two different senses of *distinctness* and *particularity*. It is here employed in the latter sense only; and, when it is said that the issue must be *certain*, the meaning is that it must be *particular* or *specific* as opposed to undue generality.²

One of the causes which have been above assigned for the practice of coming to issue made it also necessary to come to issue with some degree of certainty. The *variety in the modes of decision* required that the issue should be sufficiently certain to show whether the point in controversy consisted of *law* or *fact*; and if the latter, so far to show its nature as to ascertain by what form of trial it ought to be decided.³ But a certainty still greater than this was required by a cause of another kind, viz., the *nature of the original constitution of the*

¹ Cf. *Sturgis v. Burton*, 8 Ohio St. Nat. Bank, 121 id. 582; *I'Anson v. 215, 72 Am. Dec. 582*; *Whitney v. C. Stuart*, 1 T. R. 748, 2 Sm. Ld. Cas. & N. W. R. Co., 27 Wis. 327; *Wilson* 987, and notes.
v. Saltiel, 61 Cal. 209.

² See *The King v. Cook*, 2 Barn. &

³ *O. & M. Ry. v. Van Gelder*, 149 Cres. 871.
Ill. 668; *Pitts' Sons' Mfg. Co. v. Com.*

trial by jury. It is a matter clear beyond dispute (but one that has perhaps been too little noticed in works that treat of the origin of our laws) that the jury anciently consisted of persons who were *witnesses* to the facts, or at least in some measure *personally cognizant* of them; and who, consequently, in their verdict, gave not (as now) the *conclusion* of their judgment upon facts *proved before them in the cause*, but their *testimony* as to facts which they had *antecedently known*. (l) Accordingly, the *venire facias* issued to summon a jury, in those days, did not (as at present) direct the jurors to be summoned from the *body of the county*, but from the *immediate neighborhood* where the facts occurred, and from among those persons *who best knew the truth of the matter*. And the only means that the sheriff himself had of knowing what was the matter in controversy, so as to be in a condition to obey the writ, appears to have been the *venire facias* itself; which then stated the *nature of the issue*, instead of being confined (as now) to a short statement of the form of the action. (n) In this state of things, it was evidently necessary that the issue should be sufficiently *certain* to show specifically the nature of the question of fact to be tried. Unless it showed (for example) at what *place* the alleged matter was said to have occurred, it would not appear into what county the *venire* should be sent, nor from what neighborhood the jury were to be selected. So, if it did not specify the *time* and other particulars of the alleged transaction, the sheriff would have no sufficient guide for summoning, in obedience to the *venire*, persons able, of their own knowledge, to testify upon that matter. For all these reasons, and probably for others also, connected with the general objects of precision and clearness, (o) it was considered as one of the essential qualities of the issue that it should be *certain*; and the certainty was generally to be of the degree indicated by the preceding considerations. In modern times, as the jurors have ceased to be of the nature of *witnesses*, and are taken, generally, from the body of the county, it is no longer necessary to shape the issue for the information of the summoning

(l) See Appendix, note (48).

(n) Vide Bract., p. 309 b, 310 a, etc.

(o) It is laid down by Bracton, *oportet quod petens rem designet quam petit; videlicet qualitatem, etc., item quantitatem, etc. Certam enim rem oportet deducere in iudicium, ne contingat iudicium esse delusorium vel obscurum, etc.* Bract. 431a.

officer; and, accordingly, the *venire facias* no longer even sets the issue forth. But, as the parties now prove their facts by the adduction of evidence before the jury, and have consequently to provide themselves with the proper documents and witnesses, it is as essential that they should each be apprised of the specific nature of the question to be tried as it formerly was that the sheriff should be so instructed; and the particularity which was once required for the information of that officer now serves for the guidance of the parties themselves in preparing their proofs. (*p*)

On the whole, therefore, the author conceives the chief objects of pleading to be these: *that the parties be brought to issue*, and that the issue so produced be *material, single and certain* in its quality. In addition to these, however, the system of pleading has always pursued those general objects also, which every enlightened plan of judicature professes to regard — the avoidance of *obscurity and confusion*, of *prolixity and delay*. Accordingly, the whole science of pleading, when carefully analyzed, will be found to reduce itself to certain principal or primary rules, tending, for the most part, to one or other of the objects above enumerated, and apparently devised in reference to those objects; while there are some few remaining rules of an anomalous description that appear to belong to other miscellaneous principles. It is proposed to collect and investigate these principal rules, and to subject them to a distribution, conformable to the distinctions that thus exist between them in point of origin and object. The following chapters will therefore treat —

I. Of rules which tend simply to *the production of an issue*.

II. Of rules which tend to secure the *materiality* of the issue.

III. Of rules which tend to produce *singleness* or unity in the issue.

IV. Of rules which tend to produce *certainity* or particularity in the issue.

V. Of rules which tend to prevent *obscurity and confusion* in pleading.

(*p*) As to this latter or modern reason for certainty, see *Collett v. Lord Keith*, 2 East, 270; *J'Anson v. Stuart*, 1 T. R. 743; *Holmes v. Catesby*, 1 Taunt. 542.

VI. Of rules which tend to prevent *prolixity* and *delay* in pleading.

VII. Of certain *miscellaneous* rules. (*g*)

The discussion of these principal rules will incidentally involve the consideration of many other rules and principles of a kind subordinate to the first, but extensive, nevertheless, and important in their application; and thus will be laid before the reader an entire though general view of the whole system of pleading, and of the relations which connect its different parts with each other.

(*g*) See Appendix, note (44).

NOTE.—The attention of the reader is especially directed to the statement of the author in the Appendix, note 44, that he is the first to formulate these rules, and to the fact that though lacking in authority then they are not so now, having been recognized, adopted and universally approved by courts and jurists.

The editor has taken occasion to separate chapter two of the original work into chapters by making each principal rule the subject of a chapter.

CHAPTER V.

(SECTION I OF ORIGINAL CHAPTER II.)

OF RULES WHICH TEND SIMPLY TO THE PRODUCTION OF AN ISSUE.

§ 104. Upon examination of the process or system of allegation by which the parties are brought to issue, as that process is described in the first chapter, it will be found to resolve itself into the following fundamental rules or principles: First, *that after the declaration the parties must at each stage demur, or plead by way of traverse or by way of confession and avoidance*; secondly, *that upon a traverse issue must be tendered*; (r) lastly, *that the issue when well tendered must be accepted*. Either by virtue of the first rule a demurrer takes place which is a tender of an issue in law, or, by the joint operation of the two first, the tender of an issue in fact; and then by the last of these rules the issue so tendered, whether in fact or in law, is accepted and becomes finally complete. It is by these rules, therefore, that the production of an issue is effected, and these will consequently form the subject of the following section.

RULE I.

§ 105. After the declaration, the parties must at each stage demur, or plead by way of traverse, or by way of confession and avoidance.—

This rule has two branches:

1. The party must *demur*, or *plead*. One or other of these courses he is bound to take (while he means to maintain his action or defense), until issue be tendered. If he does neither, but confesses the right of the adverse party, or says nothing, the court immediately gives judgment for his adversary; in the former case, as by confession,—in the latter by *non pros.* or *nil dicit.* (s)

(r) With respect to *demurrer*, it will be remembered that it necessarily implies a tender of issue.

(s) As to the nature of these judgments, *vide supra*, pp. 194, 195.

2. If the party *pleads*, it must either be by way of *traverse*, or of *confession* and *avoidance*. If his pleading amount to neither of these modes of answer, it is open to demurrer on that ground. (t)¹

Such is the effect of this rule, generally and briefly considered. But for its complete illustration it will be necessary to enter much more deeply into the subject, and to consider at large the doctrines that relate both to *demurrers* and to *pleadings*.

§ 106. Of demurrer.—Under this head it is intended to treat, 1, of the nature and properties of a demurrer; 2, of the effect of passing a fault by, without demurrer, and pleading over; 3, of the considerations which determine the pleader in his election to demur or plead.

1. Of the nature and properties of a demurrer.

A demurrer may be for insufficiency either in *substance* or in *form*;² that is, it may be either on the ground that the case shown by the opposite party is *essentially insufficient*, or on the ground that it is stated in an *inartificial manner*; for “the law requires in every plea” (and the observation equally applies to all other pleadings) “two things: the one, that it be in matter sufficient—the other, that it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting, it is cause of demurrer.” (u) And we may here take occasion to remark that a violation of any of the rules of pleading that will be hereafter stated is, in general, *ground for demurrer*; and such fault occasionally amounts to matter of *substance*, but usually to matter of *form* only.

(t) Reg. Plac. 59; 1 Tidd, 582; 21 Hen. 6, 12; 5 Hen. 7, 13, a, 14, a, b.

(u) Per Lord Hobart, *Colt v. Bishop of Coventry*, Hob. 164.

¹ See *Merceron v. Dowson*, 5 Barn. & Cres. 479. A plea may deny all the facts, or it may single out some one material fact and traverse that, or it may confess all and set forth new facts in avoidance. *Hopkins v. Medley*, 97 Ill. 402. But it must do one or the other, and cannot do both. *Landis v. People*, 39 Ill. 79; *Conger v. Johnson*, 2 Denio, 96; *Brown v. Artcher*, 1 Hill, 266; *Van Etten v. Hurst*, 6 id. 311; *Chandler v. Lincoln*, 52 Ill. 75.

² Insufficiency of pleading must be taken advantage of by demurrer. *Van Sickle v. Keith* (Iowa), 55 N. W. Rep. 42; *Bemis v. Homer*, 145 Ill. 567. Improper pleas may be stricken out on motion. See *Motion to Strike*.

§ 107. **Forms of demurrer.**— A demurrer, as in its *nature* so also in its *form*, is of two kinds: it is either *general* or *special*. A general demurrer excepts to the sufficiency in general terms without showing specifically the nature of the objection;¹ a special demurrer adds to this a specification of the particular ground of exception. (x) Of both these forms the reader has already had examples in the first chapter. A general demurrer is sufficient where the objection is on matter of *substance*. A special demurrer is necessary where it turns on matter of *form* only;² that is, where, notwithstanding such objection, enough appears to entitle the opposite party to judgment, as far as relates to the merits of the cause. For by two statutes, 27 Elizabeth, chapter 5, and 4 Anne, chapter 16, passed in a view to the discouragement of merely formal objections, it is provided, in nearly the same terms, that the judges “shall give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect or want of form, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer, as causes of the same;” the latter statute adding this proviso: “so as sufficient matter appear in the said pleadings upon which the court may give judgment according to the very right of the cause.” Since these statutes, therefore, no mere matter of form can be objected on a general demurrer; but the demurrer must be in the special form, and the objection specifically stated. (z) But, on the other hand, it is to be observed that under a special demurrer the party may, on the argument, not only take advantage of the particular faults which his demurrer specifies, but also of all such objections in substance, or regarding “the very right of the cause” (as the statutes express it), as do not require, under those statutes,

(x) Co. Litt. 72, a; Reg. Plac. 125, 126; Bac. Ab., Pleas, etc., n. 5.

(z) For examples of cases where a special demurrer is considered as necessary, and where, on the other hand, a general one is sufficient, *vide* Buckley v. Kenyon, 10 East. 120; Bowdell v. Parsons, id. 359; Bolton v. Bishop of Carlisle, 2 H. Bl. 259; Bach v. Owen, 5 T. R. 409.

¹ Tyler v. Hand, 7 How. 578.

stance, if it is technically defective a

² Rudd v. Darling, 64 Vt. 456.

special demurrer should be sustained.

Though a declaration be good in substance, O. & M. R. Co. v. People, 149 Ill. 663.

to be particularly set down. (a)¹ It follows, therefore, that unless the objection be clearly of this substantial kind, it is the safer course, in all cases, to demur specially. Yet where a general demurrer is plainly sufficient, it is more usually adopted in practice, because the effect of the special form being to apprise the opposite party more distinctly of the nature of the objection, it is attended with the inconvenience of enabling him to prepare to maintain his pleading in argument, or of leading him to apply the earlier to amend. With respect to the *degree* of particularity with which, under these statutes, the special demurrer must assign the ground of objection, it may be observed that it is not sufficient to object, in general terms, that the pleading is "uncertain, defective, informal," or the like, but it is necessary to show *in what respect* uncertain, defective, or informal. (b)² The concluding words, therefore, in the example formerly given, "and also that the said declaration is, in other respects, uncertain, informal, and insufficient" (though these, or some others of similar import, are usually added), are inoperative and useless. (d)

§ 108. With respect to the effect of a demurrer.—

(a) *It is, first, a rule that a demurrer admits all such matters of fact as are sufficiently pleaded.* (e) The meaning of this rule is that the party, having had his option whether to *plead* or *demur*, shall be taken, in adopting the latter alternative, to admit that he has no ground for denial or traverse; which (as formerly shown) is one of the kinds of *pleading*. A demurrer is consequently an admission that the facts alleged are true; and therefore the only question for the court is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged. It will be observed, however, that the rule is laid down with this qualification: that the matter of fact be *sufficiently pleaded*.³ For, if it be not

(a) 1 Chitty, 642.

(b) 1 Saund. 161, n. 1, 337 b, n. 3.

(d) See Appendix, note (45).

(e) Bac. Ab., Pleas, etc. (N.) 8; Com. Dig., Pleader (Q. 5); Nowlan v. Geddes, 1 East, 684; Gundry v. Feltham, 1 T. R. 384.

¹ State v. Peck, 60 Me. 498; Davies Cases, 19; Kipp v. Bell, 86 Ill. 577; v. Gibson, 2 Ark. 117. Holmes v. C. & A. Ry., 94 id. 439.

² State v. Peck, 61 Me. 498, Ames' ³See Cook v. Rome Brick Co.

pleaded in a formal and sufficient manner, it is said that a demurrer, in this case, is no admission of the fact. (g)¹ But this is to be understood as subject to the alterations that have been introduced into the law of demurrer by the statutes already mentioned; and therefore, if the demurrer be *general*, instead of *special*, it amounts, as it is said, to a confession, though the matter be informally pleaded. (h)²

written with
idea that there
should be one
(i) of pleading
"in law only"

(b) Again, it is a rule that, on demurrer, the court will consider the whole record, and give judgment for the party who, on the whole, appears to be entitled to it. (i)³ Thus, on demurrer to the replication, if the court think the replication bad, but perceive a substantial fault in the *plea*, they will give judgment, not for the defendant, but the plaintiff, (k)⁴ provided the *declaration* be good; but if the declaration also be bad in substance, then, upon the same principle, judgment would be given for the defendant. (l) This rule belongs to the general principle stated in the first chapter, (m) that when judgment is to be given, whether the issue be in law or fact, and whether

(g) Com. Dig., Pleader (Q. 6).

(h) 1 Saund. 337 b, n. 3; 1 Arch. 318.

(i) Com. Dig., Pleader (M. 1), (M. 2); Bac. Ab., Pleas, etc., A. N. 3; Piggott's Case, 5 Rep. 29 a; 1 Saund. 285, n. 5; Foster v. Jackson, Hob. 56; Anon., 2 Wils. 150; Le Bret v. Papillon, 4 East, 502.

(k) Anon., 2 Wils. 150.

(l) Piggott's Case, 5 Rep. 29 a [Ames' Cases, 22].

(m) Vide supra, p. 204.

(Ala.), 12 S. Rep. 918; O'Rourke v. Tidd's Pr. 649; United States v. Sioux (S. D.), 19 L. R. A. 789, 54 N. Arthur, 5 Cranch, 259; Steffe v. Old W. Rep. 1044; Tyler v. Hand, 7 How. C. Ry., 156 Mass. 262; B. & O. Ry. v. Harris, 12 Wall. 65.

578; Sullivan v. Iron Silver Mine Co., 109 U. S. 550; Pullman Palace Car Co. v. Mo. Pac. R. Co., 115 U. S. 587; United States v. Van Auken, 96 U. S. 366; Kellogg v. Larkin, 3 Pinney, 123, 56 Am. Dec. 164; Mallan v. May, 11 M. & W. 653; State v. School Board, 76 Wis. 177; Bennett v. McIntire, 121 Ind. 231, 6 L. R. A. 736; Arens v. Wier, 89 Ill. 25; Ebersole v. First Nat. Bank, 86 Ill. App. 267; Scofield v. Whitelegge, 49 N. Y. 259; People v. Com'rs, 54 N. Y. S. R. 276.

Only facts alleged are admitted, not conclusions or inferences. Id. 4 See Safford v. Miller, 59 Ill. 205; Illinois Fire Ins. Co. v. Stanton, 57 id. 359; Fort Dearborn L. v. Klein, 115 id. 177; A. & O. Canal Co. v. Leitch, 4 Denio, 65. A special demurrer is general to everything except that to which it is filed and cannot be carried back. Kent v. Miles, 65 Vt. 582.

Id.

¹ See above cases.

the cause have proceeded to issue or not, the court is always bound to examine the whole record and adjudge for the plaintiff or defendant, according to the legal right, as it may on the whole appear.¹ It is, however, subject to the following exceptions: First, if the plaintiff demur to a *plea in abatement*, and the court decide against the plea, they will give judgment of *respondeat ouster* without regard to any defect in the declaration. (n)² Secondly, the court will not look back into the record to adjudge in favor of an apparent right in the plaintiff, unless the plaintiff have himself put his action upon that ground. Thus, where, on a covenant to perform an award, and not to prevent the arbitrators from making an award, the plaintiff declared in covenant, and assigned as a breach that the defendant would not pay the sum awarded, and the defendant pleaded that, before the award made, he revoked, by deed, the authority of the arbitrators, to which the plaintiff demurred, the court held the plea good as being a sufficient answer to the breach alleged, and therefore gave judgment for the defendant, although they also were of opinion that the matter stated in the plea would have entitled the plaintiff to maintain his action if he had alleged, by way of breach, that the defendant prevented the arbitrators from making their award. (o) Lastly, the court, in examining the whole record to adjudge according to the apparent right, will consider only the right in *matter of substance*, and not in respect of mere *form*, such as should have been the subject of special demurrer.³ Thus, where the declaration was open to an objection of form, such as should have been brought forward by special demurrer,—the plea bad in substance,—and the defendant de-

(n) *Belasyse v. Hester*, Lutw. 1592; *Routh v. Weddell*, id. 1667; *Hastrop v. Hastings*, 1 Salk. 212; *Rich v. Pilkington*, Carth. 172.

(o) *Marsh v. Bulteel*, 5 Barn. & Ald. 507.

¹ *Auburn Co. v. Leitch*, 4 Den. 65; 6 B. & C. 216, *Ames' Cases*, 28; *Shaw v. Tobias*, 3 N. Y. 188; *Dupree*

v. Blake, 148 Ill. 453; *Murphy v. Richards*, 5 Watts & S. 279; *Fort Dearborn Lodge v. Klein*, 115 Ill. 177. The court has only to deal with its own record. *Pac. R. Co. v. Mo. Pac. R. Co.*, 11 U. S. 505; *Davis v. Penton*,

Dickson v. Wilkinson, 3 How. 57.

² *Ryan v. May*, 14 Ill. 49; *Hunter v. Bilyeu*, 39 id. 370; *Crawford v. Slade*, 9 Ala. 887, 44 Am. Dec. 463; *State v. Hamlin*, 47 Conn. 118; *Myers v. Erwin*, 20 Ohio, 382, n.

³ *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65; *Aurora v. West*, 7 id. 82.

murred to the replication, the court gave judgment for the plaintiff in respect of the insufficiency of the plea without regard to the formal defect in the declaration. (p)¹

§ 109. Pleading over without demurrer.— 2. Next is to be considered the effect of pleading over without demurrer.

It has been shown that it is the effect of a demurrer to admit the truth of all matters of fact sufficiently pleaded on the other side; but it cannot be said, *e converso*, that it is the effect of a pleading to admit the sufficiency in law of the facts adversely alleged. On the contrary, it has been seen that upon a demurrer arising at a subsequent stage of the pleading, the court will take into consideration, retrospectively, the sufficiency in law of matters to which an answer in fact had been given. And in the first chapter it was shown² that even after an issue in fact, and verdict thereon, the court are bound to give judgment on the whole record, and therefore to examine the sufficiency in law of all allegations through the whole series of the pleadings; and, accordingly, that advantage may often be taken by either party of a legal insufficiency in the pleading on the other side, either by motion in arrest of judgment, or motion for judgment *non obstante veredicto*, or writ of error, according to the circumstances of the case.

It thus appears, then, that in many cases a party, though he has pleaded over without demurring, may, nevertheless, afterwards avail himself of an insufficiency in the pleading of his adversary. But this is not universally true. For, first, it is to be observed *that faults in the pleading are, in some cases,*

(p) *Humphrey v. Bethily*, 2 Vent. 198-222.

¹ A demurrer to one pleading will not be carried back to another to which it did not profess to be an answer and with which it has no connection. *Ryan v. May*, 14 Ill. 49; *Hunter v. Bilyeu*, 39 id. 368.

² Ordinarily a demurrer to a pleading which is held good cannot be carried back to a previous defective pleading. *Dearborn v. Kent*, 14 Wend. 183. But if the declaration is materially and fatally defective the demurrer will be carried back.

People v. City of Spring Valley, 129 Ill. 169; *Fort Dearborn Lodge v. Klein*, 115 id. 177. It is generally said that a demurrer will not be carried back of the general issue. *Dearborn v. Kent*, 14 Wend. 183; *Compton v. People*, 86 Ill. 176. But this position would not seem tenable when the declaration is substantially defective so as not to be good after verdict. *Auburn & O. Co. v. Leitch*, 4 Den. 65; *Shaw v. Tobias*, 3 N. Y. 188.

aided by pleading over. (s)¹ Thus, in an action of trespass for taking a hook, where the plaintiff omitted to allege in the declaration that it was *his* hook, or even that it was in his possession, and the defendant pleaded a matter in confession and avoidance, justifying his taking the hook *out of the plaintiff's hand*, the court, on motion in arrest of judgment, held, that as the plea itself showed that the hook was in the possession of the plaintiff, the objection, which would otherwise have been fatal, was cured. (t) And, with respect to all *objections of form*, it is laid down as a general proposition, "that if a man pleads over he shall never take advantage of any slip committed in the pleading of the other side, which he could not take advantage of upon a general demurrer." (u) Again, it is to be observed *that faults in the pleading are, in some cases, aided by a verdict.* (x)² Thus, if the grant of a reversion, a rent charge, an advowson, or any other hereditament which lies *in grant*, and can only be conveyed by deed, be pleaded, such grant ought to have been alleged to have been made *by deed*; and if not so alleged, it will be ground of demurrer; but if the opposite party, instead of demurring, pleads over, and issue be taken upon the grant, and the jury find that the grant was made, the verdict aids or cures the imperfection in the pleading; and it cannot be objected in arrest of judgment or by writ of error. (y) The extent and principle of this rule of *aided by verdict* is thus explained in a modern decision of the court of king's bench: "Where a matter is so essentially necessary to be proved, that, had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in ex-

(s) Com. Dig., Pleader (C. 85), (E. 37); Co. Litt. 308 b; Pract. Reg. 351; Glasscock v. Morgan, 2 Salk. 519.

(t) Anon., Sid. 184, cited Bac. Ab., Trespass, p. 608.

(u) Per Holt, C. J., Anon., 2 Salk. 519; Bac. Ab., Pleas, etc., 322; 6 Barn. & Ald. 29.

(x) Com. Dig., Pleader (C. 87); 1 Saund. 228, n. 1; Weston v. Mason, 3 Burr. 1725; Spieres v. Parker, 1 T. R. 141; Johnston v. Sutton, id. 545; Nerot v. Wallace, 3 T. R. 25; Jackson v. Peaked, 1 M. & S. 234; Campbell v. Lewis, 3 Barn. & Ald. 393; Keyworth v. Hill, id. 685; Pippett v. Hearn, 5 Barn. & Ald. 634.

(y) 1 Saund. 228 b; Lightfoot v. Brightman, Hutt. 54.

¹ See Fowle v. Welsh, 1 Barn. & 202; Keegan v. Kinnare, 123 id. 292; Cres. 229; Fletcher v. Pogson, 3 id. 1 Chitty, Pl. (14th Am. ed.) 673; Bennett v. Edwards, 7 Barn. & Cres. 702; 192.

² Helmuth v. Bell, 150 Ill. 263; A., Harris v. Beard, 4 Bing. 646; Nurse T. & S. F. R. Co. v. Feehan, 149 id. v. Willis, 4 Barn. & Ad. 739.

press terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by a verdict; and where a general allegation must, in fair construction, so far require to be restricted, that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed, after verdict, that it was so restrained at the trial." (2) In entire accordance with this are the observations of Mr. Sergeant Williams: "Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict." (a) It is, however, only where such "fair and reasonable intendment" can be applied that a verdict will cure the objection; and therefore if a necessary allegation be altogether omitted in the pleading, or if the pleading contain matter adverse to the right of the party by whom it is alleged, and so clearly expressed that no reasonable construction can alter its meaning, a verdict will not aid. (b) Therefore, where the plaintiff brought an action of trespass on the case, as being entitled to the reversion of a certain yard and wall, to which the declaration stated a certain injury to have been committed, but omitted to allege that the *reversion* was in fact prejudiced, or to show any grievance which, in its nature, would necessarily prejudice the reversion, the court arrested the judgment, after a verdict had been given in favor of the plaintiff, and held the fault to be one which the verdict could not cure. (c) Lastly, it is to be observed that, at certain stages of the cause, all objections of form are cured by the different statutes of *jeofails* and *amendments*; (d) the cumulative effect of which is to provide that

(2) Jackson v. Pecked, 1 M. & S. 234.

(a) 1 Saund. 228 a.

(b) Jackson v. Pecked, 1 M. & S. 234; Nerot v. Wallace, 3 T. R. 25; Weston v. Mason, 3 Burr. 1725.

(c) Jackson v. Pecked, 1 M. & S. 234.

(d) Vide *supra*, p. 185.

neither after verdict nor judgment by confession, *nil dicit*, or *non sum informatus*, can the judgment be arrested or reversed by any objection of that kind. Thus, in an action of trespass, where the plaintiff omits to allege in his declaration on what certain day the trespass was committed (which is ground for demurrer), and the defendant, instead of demurring, pleads over to issue, and there is a verdict against him, the fault is cured by the statutes of jeofails; (e) if not, also, by the mere effect of pleading over.¹

§ 110. Election to demur or plead.—3. It will now be useful to examine the considerations by which, in a view to the state of the law as above explained, the pleader ought to be governed in making his election to *demur* or to *plead*.

He is first to consider whether the declaration or other pleading opposed to him is sufficient, in substance and in form, to put him to his answer. If sufficient in both, he has no course but to plead. On the other hand, if insufficient in either, he has *ground* for demurrer; but whether he should demur or not is a question of expediency to be determined upon the following views. If the pleading be insufficient in *form*, he is to consider whether it is worth while to take the objection, recollecting the indulgence which the law allows in the way of *amendment*; (f) but also bearing in mind that the objection, if not taken, will be aided by pleading over, or, after pleading over, by the verdict or by the statutes of amendments and jeofails. And if he chooses to demur, he must take care to demur specially, lest, upon general demurrer, he should be held excluded from the objection. On the other hand, supposing an insufficiency in *substance*, he is to consider whether that insufficiency be in the case itself or in the manner of statement; for, on the latter supposition, it might be removed by an amendment; and it may, therefore, not be worth while to demur. And whether it be such as an amendment would remove or not, a farther question will arise whether it be not expedient to pass by the objection for the present and plead

(e) 3 Bl. Com. 394; 1 Saund. 298 c., where Mr. Sergeant Williams corrects a mistake in the passage in Blackstone's Commentaries.

(f) *Vide supra*, pp. 125, 226.

¹ Bayard v. Malcolm, 1 Johns. 453; s. c., 2 Johns. 550. See, also, App., Amendments and Jeofails.

over. For a party, by this means, often obtains the advantage of contesting with his adversary, in the first instance, by an issue in fact, and of afterwards urging the objection in *law*, by motion in arrest of judgment or writ of error.¹ This double aim, however is not always advisable; for, though none but *formal* objections are cured by the statutes of jeofails and amendments, there are some defects of *substance* as well as *form*, which are aided by pleading over or by a verdict; (g)² and therefore, unless the fault be clearly of a kind not to be so aided, a demurrer is the only mode of objection that can be relied upon. The additional delay and expense of a trial is also, sometimes, a material reason for proceeding in the regular way by demurrer, and not waiting to move in arrest of judgment or to bring a writ of error. And a concurrent motive for adopting that course is, that *costs* are not allowed when the judgment is arrested, (h) nor where it is reversed upon writ of error (i) (each party in these cases paying his own); but on demurrer, the party succeeding obtains his costs.

§ 111. Of pleadings.— Having now taken some view of the doctrine of *demurrers*, the next subject for consideration will be that of *pleadings*.

Under this head it is proposed to examine, 1, the nature and properties of *traverses*; 2, the nature and properties of pleadings in *confession and avoidance*; 3, the nature and properties of *pleadings in general*; without reference to their quality, as being by way of traverse, or confession and avoidance.

1. Of the nature and properties of traverses.

Of *traverses* there are various kinds. The most ordinary kind is that which may be called a *common* traverse. It consists of a *tender of issue*; that is, of a denial, accompanied by

(g) As in the example, *supra*, p. 227.

(h) 1 Sel. Pract. 497; *Cameron v. Reynolds*, Cowp. 407.

(i) 2 Tidd, 1101.

¹ *Helmuth v. Bell*, 150 Ill. 263; *A., T. & S. F. Ry. Co. v. Feehan*, 149 id. 202; 1 Chitty, Pldg. (14th Am. ed.) 673. See *Lord Cromwell's Case*, 14 Rep. 14 a.

² *Whittmore v. Ware*, 101 Mass. 853; *Slack v. Lyon*, 9 Pick. 62; *Libby et al. v. Scherman*, 146 Ill. 540. As to aider by pleading over, see 1 Saund. Rep. 228, note; *Boyd v. Blankman*, 29 Cal. 19, 87 Am. Dec., note; *Rush-ton v. Aspinall*, Doug. 679; 1 Sm. Ld. Cas. (8th Am. ed.) 1445. Aider by verdict, see further, *Vadakin v. Saper*, 1 Aik. 287; 2 Am. Ld. Cas. 143; *Hughes' Tech. Law*, tit. Aider.

a formal offer of the point denied, for decision; (*k*)¹ and the denial that it makes is by way of *express contradiction in terms of the allegation traversed*. Of this kind, examples have already been given in the first chapter. (*l*)

Upon referring to these, it will be found that they are all expressed in the *negative*. That, however, is not invariably the case with a common traverse; for if opposed to a precedent negative allegation, it will, of course, be in the *affirmative*; as in the following example:

PLEA

Of the Statute of Limitations.

In assumpsit.

(*m*) And the said C. D., by — — —, his attorney, comes and defends the wrong and injury, when, etc., and says that the said A. B. ought not to have or maintain his aforesaid action against him; because he says that he, the said C. D., did not, at any time within six years next before the commencement of this suit, undertake or promise in manner and form as the said A. B. hath above complained. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action against him, etc.

REPLICATION.

And the said A. B. says that, by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said C. D.; because he says that the said C. D. did, within six years next before the commencement of this suit, undertake and promise in manner and form as he, the said A. B., hath above complained. And this he prays may be inquired of by the country.

§ 112. Of the general issue.— Besides this, the common kind, there is a class of traverses which, from its great frequency and importance in practice, requires particular notice. It is that of the *general issues*. In most of the usual actions there is an appropriate plea, fixed by ancient usage, as the proper method of traversing the declaration in cases where the defendant means to deny the whole or the principal part

(*k*) See the definition of *tendering issue* given in the first chapter, *supra*, p. 148.

(*l*) *Vide supra*, pp. 146, 147.

(*m*) Pleadings are always entitled at the commencement; *i. e.*, have a superscription of the court and term, as in the examples in the first chapter; but in this and all subsequent examples the title is, for the sake of brevity, omitted.

¹ Chapman v. Smith, 16 How. 114.

of its allegations. (n) This form of plea or traverse is called *the general issue* in that action; and it appears to be so called because the issue that it tenders, involving the whole declaration or the principal part of it, is of a more general and comprehensive kind than that usually tendered by a common traverse. From the examples of it that will be presently given, it will be found that not only in extent or comprehensiveness, but in point of form also, it differs somewhat from a common traverse; for though, like that, it *tenders issue*, yet in several instances it does not contradict *in terms of the allegation traversed*, but in a more general form of expression. (o)

In the *writ of right*, and in *dower*, there seems to be (properly speaking) *no general issue*. (p)

In *formedon* the general issue is in the following formula, and is called the plea of *ne dona pas*, or *non dedit*:

And the said C. D., by — —, his attorney, comes and defends his right, when, etc., and says that the said E. F. did not give the said manor, with the appurtenances, or any part thereof, to the said G. B. and the heirs of his body issuing, in manner and form as the said A. B. hath in his said count above alleged. And of this the said C. D. puts himself upon the country. (q)

In *quare impedit* the general issue is called *ne disturba pas*, (r)¹ and it is in the following form:

And the said Bishop, C. D. and E. F., by — —, their attorney, come and defend the wrong and injury, when, etc., and say that they do not hinder the said A. B. to present a fit person to the said church, in manner and form as the said A. B. hath in his said declaration above alleged. And of this the said Bishop, C. D. and E. F. put themselves upon the country. (s)

In *debt on bond* or *other specialty*, the general issue is called the plea of *non est factum*, and is as follows:

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says that the

(n) Reg. Plac. 57; Doct. & Stud. 272.

(o) See the general issues of *non est factum*, and not guilty, *post*, p. 231.

(p) See Appendix, note (46).

(q) 10 Went. 182.

(r) Colt v. Bishop of Coventry, Hob. 162.

(s) Vide Rast. 517; Winch. Ent. 703.

¹ See in Read v. Brookman, 3 T. R. *quare impedit* there is no general issue, a *dictum* to the effect that in issue.

said supposed writing obligatory [or "*indenture*" or "*articles of agreement*," according to the subject of the action] is not his deed. And of this he puts himself upon the country. (t)

In *debt* on *simple contract* the general issue is called the plea of *nil debet*,¹ and is thus:

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the said A. B. hath above complained. And of this the said C. D. puts himself upon the country.

✓ In *covenant* the general issue is *non est factum*, and its form is similar to that in *debt* on specialty.

In *detinue* the general issue is called the plea of *non detinet*, and is as follows:

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says that he does not detain the said goods and chattels [or, "*deeds and writings*," according to the subject of the action] in the said declaration specified, or any part thereof, in manner and form as the said A. B. hath above complained. And of this the said C. D. puts himself upon the country.

✓ In *trespass* the general issue is called the plea of *not guilty*, and is as follows:

And the said C. D., by — —, his attorney, comes and defends the force and injury, when, etc., and says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in manner and form as the said A. B. hath above complained. And of this the said C. D. puts himself upon the country.

In *trespass on the case* (in the species of *assumpsit*), the general issue is called the plea of *non assumpsit*, and is as follows:

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not undertake or promise in manner and form as the said A. B. hath above complained. And of this the said C. D. puts himself upon the country.

(t) Though *non est factum* is, in most cases, the general issue in *debt* on specialty, yet, when the deed is only *inducement* to the action, that is, introductory to some other matter on which it is mainly founded, the general issue is *nil debet*, as in the next form.

¹ By the rules of Hil. T., 4 Will. IV., the form of plea given is *never indebted*.

In trespass on the case, in general, the general issue is not guilty, and is thus:

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the premises above laid to his charge in manner and form as the said A. B. hath above complained. And of this the said C. D. puts himself upon the country.

✓ In *replevin* the general issue is called the plea of *non cepit*, and is as follows:

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says that he did not take the said cattle [or "*goods and chattels*," according to the subject of the action] in the said declaration mentioned, or any of them, in manner and form as the said A. B. hath above complained. And of this the said C. D. puts himself upon the country.

A very important effect attends the adoption of the general issue, viz.: that by tendering the issue on the declaration, and thus closing the process of the pleading, at so early a stage, it throws out of use, wherever it occurs, a great many rules of pleading applying exclusively to the remoter allegations. For it is evident that, when the issue is thus tendered in the plea, the whole doctrine relating to pleadings in confession and avoidance, replications, rejoinders, etc., is superseded. At the same time, the general issue is of very frequent occurrence in pleading; and it has therefore, on the whole, the effect of narrowing very considerably the application of the greater and more subtle part of the science.

The important character of this plea makes it material to explain distinctly in what cases it may and ought to be used; and this is the more necessary because an allowed relaxation in the modern practice has, in some actions, given it an application more extensive than belongs to it in principle.¹ To

¹ The principal matters to bear in mind in considering the quality of these pleas of the general issue is the peculiar effect of the plea in the actions of *assumpsit* and debt. In *assumpsit*, generally speaking, anything which tends to show that the plaintiff had no cause of action at the time he brought the suit, even though the defense consists of mat- ter of fact taking place subsequent to the time of making the promise, if express, or the accruing of the action by implication of law, may be given in evidence under the general issue. So in debt upon *simple contract* the plea has the same effect. As pointed out by Chitty and our author, when the contract was implied there was no violence done to

obtain a clear view of this subject we must examine the language of the different general issues in reference to the declarations which they respectively traverse.

First, with respect to the general issue in *formedon*, we find that this plea simply denies the gift in tail to have been made in manner and form as alleged. It will therefore be the proper plea if the tenant means to dispute the fact of the gift, but will apply to no other case.

In *quare impedit* the general issue simply denies that the defendant obstructed the presentation, and is adapted to no other ground of defense.

§ 113. In debt on specialty and in *covenant*,¹ the general issue, *non est factum*, denies that the deed mentioned in the

logic, nor was the plea lacking in that quality which should pervade all pleading, viz.: every pleading should notify the opposite party of the facts he was to meet; but after the extension of the effect of *non assumpsit* and *nil debet* to express contracts the plea lost this quality. This departure from principle has been met by protests from time to time, and Blackstone remarks of it, that although it would seem as if much confusion would follow, yet experience has shown it to be otherwise, especially with the aid of a new trial. 3 Cooley's Black. *303.

The right to require a bill of particulars is always a certain remedy to prevent surprise. That the perverted use of the general issue is a departure from principle is plain. 1 Chitty Pl. *472; Gardner v. Buckbee, 3 Cow. 120; Ld. Raym. 217; Waidner v. Pauley, 141 Ill. 442.

Writers upon code pleading have had quite as much to contend with in discussing the application of the general denial under our codes as did Stephen in reference to the general issue. Pomeroy, Code Rem., § 643. The practice ought to conform to the facts, either express or implied, and might easily be made to

do so if the principles were first acquired. These principles are well elucidated in the opinion of Justice Selden in *McKyring v. Bull*, 16 N. Y. 297. The forms of general denial under the codes, which are analogous to the general issue at common law, have been changed, and also the effect of them, with the idea of making them conform to the principles of the ancient common law, by confining their operation to facts. Maxwell, Code Pl. 17. An exceedingly loose and uncertain practice has grown up under these general denials, in no way preferable to the departures from the common-law idea just mentioned. *Youngs v. Kent*, 46 N. Y. 672. If a pleading is indefinite, the opposite party must move to make it more definite and certain. The substantial difference seems merely to be, that while under the common-law general issue the plaintiff could never be sure as to what the line of defense would be, he could know precisely by requiring a bill of particulars. Under the code, if the denial was not specific, the other party might move to make it so. See *Burley v. German Am. Bank*, 111 U. S. 221.

¹ There is no general issue, strictly

declaration is the deed of the defendant. Under this, the defendant at the trial may contend either that he never executed such deed as alleged, or that its execution was absolutely void in law; as, for example, on the ground that the alleged obligor or covenantor was a married woman, or a lunatic; (u)¹ but if the defendant's case consist of anything but a denial of the execution of the deed, or some fact impeaching the validity of its execution, the plea will be improper. (x)

§ 114. *Debt on simple contracts.*—If the general issue in *debt on simple contract* be now examined, its effect and application will be found to be much more extensive. The declaration alleges that the defendant was indebted to the plaintiff on some consideration, *e. g.*, for goods sold and delivered. (y) The general issue alleges "that he does not owe the sum of money," etc. Were the allegation merely that "the goods were not sold and delivered," it would of course be applicable to no case but that where the defendant means to deny the sale and delivery; but as the allegation is that he *does not owe*, it is evident that the plea is adapted to any kind of de-

(u) Com. Dig., Pleader (2 W. 18).

(x) Matters which make the deed *voidable* only, and not absolutely *void*,—such as *duress*,—must be specially pleaded, and cannot be given in evidence under *non est factum*. Com. Dig., Pleader (2 W. 19); 2 Inst. 488.

(y) *Vide supra*, p. 115.

speaking, in covenant, but *non est factum* may be used. Longley v. Norvall, 1 Scam. 389. See Bender v. Fromberg, 4 Dall. 486.

¹ Anthony v. Wilson, 14 Pick. 303; Longley v. Norvall, 1 Scam. 384; 1 Chitt. 483; Mix v. People, 92 Ill. 549; Bullis v. Giddens, 8 Johns. 83; Pritchett v. People, 1 Gilm. 525. *Nul tiel record* is the proper plea in debt upon a justice's record. Adair's Adm'r v. Rogers, Wright (O.), 428; Ellsworth v. Learned, 21 Vt. 535. But *nil debet* is good against a justice's judgment of another state. Cole v. Driskell, 1 Blackf. (Ind.) 16, and note. Not against an action upon a judgment in a court of record of a sister state. Hall v. Williams, 6 Pick. 232, 17 Am. Dec. 356; Knickerbocker Life Ins. Co. v. Barker, 55 Ill. 241; Mills v.

Duryee, 7 Cranch, 481. *Cf.* Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319. The plea of *nul tiel record* puts in issue simply the existence of such a record as may have been declared upon. Stevens v. Fisher, 30 Vt. 200; Gay v. Lloyd, 1 G. Greene, 787, 46 Am. Dec. 498; Sammis v. Wightman, 31 Fla. 10. Where there was no legal capacity to make the bond, the plea may be *non est factum*. Anthony v. Wilson, 14 Pick. 303. *Nil debet* is not a good plea to an action of debt upon a specialty where the deed is the foundation of the action; otherwise where the deed is only inducement. Matthews v. Redwine, 23 Miss. 233; Hannah v. McKenzie, 5 B. Mon. 314, 43 Am. Dec. 122; Sneed v. Wister, 8 Wheat. 690; Davis v. Burton, 3 Scam. 41, 36 Am. Dec. 511.

fense that tends to deny *an existing debt*; and therefore not only to a defense consisting in a denial of the sale and delivery, but to the defenses of *release, satisfaction, arbitrament* and a multitude of others, to which a general issue of a narrower kind,—for example, that of *non est factum*,—would, in its appropriate actions, be inapplicable. In short, there is hardly any matter of defense to an action of debt to which the plea of *nil debet* may not be applied, because almost all defenses resolve themselves into a denial of *the debt*.¹

§ 115. In *detinue* the declaration states that the defendant detains certain goods of the plaintiff; (z) the general issue alleges that he “does not detain the said goods in the said declaration specified,” etc. This will apply either to a case where the defendant means to deny that he detains the goods mentioned, or to a case where he means to deny that the goods so detained are the *property of the plaintiff*; for, if they are not the plaintiff’s property, then it is true that the defendant does not detain the goods specified in the declaration, the only goods there specified being described as the *goods of the plaintiff*.

§ 116. In *trespass* the general issue, *not guilty*, evidently amounts to a denial of the trespasses alleged, and no more. Therefore if in trespass for assault and battery the case be that the defendant has *not* assaulted or beat the plaintiff, it will be proper that he should plead the general issue; but if his case be of any other description, the plea will be inapplicable. So, in trespass *quare clausum fregit*, or for taking the plaintiff’s goods, if the defendant did not in fact break and enter the close in question, or take the goods, the general issue, “not guilty,” will be proper. It will also be applicable if he *did* break and enter the close, but it was not *in the possession of the plaintiff*, or, not *lawfully in his possession, as against*

(z) *Vide supra*, p. 117.

¹ 1 Saund. 38; King v. Ramsey, 13 ton, 3 J. J. Marsh. 600, 20 Am. Dec. Ill. 619; Jansen v. Ostrander, 1 Cow. 179; Matthews v. Redwine, 23 Miss. 670. In some actions of debt not 233; Sneed v. Wister, 8 Wheat. 600. guilty is allowable. Stilson v. Tobey, This is a good plea to a declaration 2 Mass. 521. When the deed is not on a foreign judgment when there the ground, but only the induce- was no jurisdiction. Judkins v. ment, of the declaration, *nil debet* Union M. Ins. Co., 37 N. H. 470. See may be pleaded. Williams v. Pres- McRae v. Mattoon, 13 Pick. 53.

the better title of the defendant. (a) So it will be applicable if he did take the goods, but they did not *belong to the plaintiff*. For, as the declaration alleges the trespass to have been committed on the close or goods *of the plaintiff*, the plea of *not guilty* involves a denial that the defendant broke and entered the close or goods *of the plaintiff*; and is therefore a fit plea, if the defendant means to contend that the plaintiff had no possession of the close, or property in the goods, sufficient to entitle him to call them his own. But if the defense be of any other kind, the general issue will not apply.¹

So far all is consistent with the form and principle of these several pleas; but with respect to the two general issues that next follow, the case is somewhat different.

§ 117. *Assumpsit*.—First, with respect to that in *assumpsit*. The declaration in this action (b) states that the defendant, upon a certain consideration therein set forth, made a certain promise to the plaintiff. The general issue in this action states that the defendant “did not promise and undertake in manner and form,” etc. This, at first sight, would appear to put in issue merely the fact of his having made a promise such as alleged. A much wider effect, however, belongs in practice to this plea; and was originally allowed (as it would appear) in reference to the following distinction. It has been already stated, in a former part of the work, (c) that the law will always *imply* a promise in consideration of an existing

(a) *Dodd v. Kiffin*, 7 T. R. 354.

(b) *Vide supra*, pp. 85 and 120.

(c) *Vide supra*, p. 85.

¹ Not guilty is a denial of the right of the plaintiff and of the act of trespass. *Floyd v. Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Hunter v. Hatton*, 4 Gill, 115, 45 Am. Dec. 117. See, also, *Milman v. Dolwell*, 2 Camp. 378. Compare *Harris v. Miner*, 28 Ill. 135, which contains a *dictum* to the contrary, probably induced by the remarks of Mr. Addison as to the English decisions under the rules of Hil. Term, 16 Vict. 1.

A justification or discharge must be specially pleaded. *Senecal v. Labadie*, 42 Mich. 126; *Hahn v. Ritter*,

12 Ill. 80; *Harris v. Miner*, 28 id. 135; *Olsen v. Upsahl*, 69 id. 273; *Van Namee v. Bradley*, id. 299; *Comstock v. Odorman*, 18 Ill. App. 326; *Coles v. Carter*, 6 Cow. 691; *Ruggles v. Lesure*, 24 Pick. 187; *Finch v. Alston*, 2 Stewart & Port. 83, 23 Am. Dec. 299. When the defendant pleads property in a third person, and justifies the taking under process against him, the plaintiff must reply traversing the ownership. *Simmons v. Jenkins*, 76 Ill. 480; *Chandler v. Lincoln*, 52 id. 75; *Constantin v. Foster*, 57 id. 36.

debt or liability; and that the action of *assumpsit* may be consequently founded on a promise either *express* or *implied*. When the promise relied upon was of the *latter* kind, and the defendant pleaded the general issue, the plaintiff's mode of maintaining the affirmative of this issue on the trial was, of course, by proving that debt or liability on which the implied promise would arise; and in such case it was evidently reasonable that the defendant also should, under his plea denying the promise, be at liberty to show any circumstance by which the debt or liability was disproved; such, for example, as performance or a release. Accordingly, in actions on *implied assumpsits*, this effect was, on the principle here mentioned, allowed to the general issue. (d) But it was at first allowed in the case of implied *assumpsits* only;¹ and where an *express* promise was proved, the defendant, in conformity with the language and strict principle of his plea, was permitted, under the general issue, only to contest the fact of the promise; or, at most, to show that on the ground of some illegality it was a promise void in law. This practice, however, was by relaxation gradually applied to those on *express* promises also; and at length, in *all* actions of *assumpsit*, without distinction, the defendant was, under the general issue, permitted not only to contend that no promise was made, or to show facts impeaching the validity of the promise, but to prove any matter of defense whatever which tends to deny his debt or liability, subject, however, to a few exceptions to be presently noticed.

This is a great deviation from principle; for it is to be observed that many of these matters of defense are such, as in the case of express promise, as ought regularly to be pleaded in *confession and avoidance*. Thus, if the defendant be charged with an express promise, and his case be that after making such promise it was *released* or *performed*, this plainly *confesses and avoids* the declaration. To allow the defendant, therefore, to give this in evidence under the general issue, which is a plea by way of *traverse*, is to lose sight of the distinction between the two kinds of pleading. And even where

(d) *Fritz v. Freestone*, 1 Mod. 210; Vin. Ab., Evidence, Z. a.; 1 Chitty, 471.

¹ See *Gardner v. Buckher*, 8 Cow. 120; *McKyring v. Bell*, 16 N. Y. 297.

the matters of defense thus admitted in evidence are *not* such as would have been pleadable by way of confession and avoidance, but are in the nature of a traverse of the declaration, yet they are almost always inconsistent with the form and language of the general issue in this action, which (as has been seen) consists of a denial of the *promise* only and purports to traverse no other part of the declaration.¹ Thus, in an action which has become, of all others, the most frequent and general in its application, the science of pleading has been, in a great measure, superseded by an innovation of practice, which enables the parties to come to issue upon the plea (the second step in the series of allegations) in a great variety of cases, which would formerly have led to much remoter or more specific issues. This important inroad on the ancient dominion of pleading has been effected for more than a century past, (e) and was probably first encouraged by the judges in consequence of a prevalent opinion that the rules of this science were somewhat more strict and subtle than is consistent with the objects of justice; and that, as the general issue tended to abbreviate its process and proportionably to emancipate the suitors from its restrictions, it was desirable to extend, as much as possible, the use and application of that plea.

§ 118. *Trespass on the case.*—Next in order is the general issue, which belongs to the action of *trespass on the case in general*. The declaration in this action sets forth specifically the circumstances which form the subject of complaint. (f) The general issue, *not guilty*, is a mere traverse or denial of the facts so alleged; and therefore, on principle, should be applied only to cases in which the defense rests on such denial. But here a relaxation has taken place, similar to that which prevails in *assumpsit*; for, under the plea now in question, a defendant is permitted not only to contest the truth of the declaration, but (with certain exceptions to be presently noticed) to prove any matter of defense that tends to show that the plaintiff has no right of action, though such matters be in confession and avoidance of the declaration; as, for example,

(e) *Vide* 12 Mod. 377, where Holt, C. J., says: "It is indulgence to give accord with satisfaction in evidence upon *non assumpsit* pleaded; but that has crept in, and now is settled."

(f) *Supra*, pp. 120, 121, 122.

¹ See *ante*, p. 232, note.

a release given or satisfaction made. This latitude was no doubt originally allowed in the same view that prompted the encouragement of the general issue in *assumpsit*. It is not, however, easy to conceive by what artifice of reasoning the relaxation was in this case held to be reconcilable with the principles of pleadings, to which it stands in apparent variance; and perhaps the truth is that the practice in question was first applied to the general issue in trespass on the case *in general*, without regard to any principle beyond that of a forced analogy to the similar practice in trespass on the case in *assumpsit*. (g)¹

§ 119. *Replevin*.—Lastly, the general issue, *non cepit in replevin*, applies to the case where the defendant has not, in fact, taken the cattle or goods, or where he did not take them, or have them, in the *place* mentioned in the declaration. (h) For it will be observed that the declaration alleges that the defendant “took certain cattle or goods of the plaintiff in a certain place called,” etc.; (i) and the general issue states that he did not take the said cattle or goods “in manner and form as alleged;” which involves a denial both of the taking and of the place in which the taking was alleged to have been—the *place* being a material point in this action. (k)²

§ 120. *Observations on the general issue*.—Such is, in general, the scope and effect in each of the most usual actions of the *general issue*. But there are still some observations nec-

(g) See, however, Lord Mansfield's explanation of the reason for allowing this practice in trespass on the case. *Bird v. Randell*, 3 Burr. 1353; 1 Chitty, 486.

(h) 1 Chitty, 490; 2 Chitty, 508.

(i) *Supra*, p. 124.

(k) It may occur that this plea ought, upon principle already explained with respect to *detinue* and *trespass* (*supra*, pp. 235, 236), to be also applicable to the case where the defendant denies the *plaintiff's property* in the goods; but the law is not so. 1 Chitty, 159; 1 Vent. 249.

¹ See *ante*, § 112.

² *Non cepit* puts in issue the caption and detention only, admitting the property. *MacKinley v. McGregor*, 8 Whart. 369, 31 Am. Dec. 522. Neither the plea of *non cepit* or *non detinet* denies the ownership of the plaintiff, and a verdict for the defendant on such pleas will not entitle a return of the property. The right of

property can only be put in issue by a special plea. *Chandler v. Lincoln*, 52 Ill. 74. When the defendant pleads property in a third person or in himself, and traverses plaintiff's property, the allegation of the property in the third person is inducement. *Chandler v. Lincoln*, 52 Ill. 74; *Constantine v. Foster*, 57 id. 86.

essary to complete the reader's view of that subject. It has been seen that in trespass on the case the defendant is allowed under the general issue to give in evidence matters which do not fall within the strict principle of that plea; and among these, matters *confession and avoidance*. But it is to be understood with respect to matters of this latter description, that, though *allowed*, he is in no case *obliged* to take that course, but may still plead by way of confession and avoidance all such matters as properly fall within the principle of such pleadings; that is, all matters which confess what is adversely alleged, but repel or obviate its legal effect.¹ Thus, the defendant *may* in *assumpsit* and other actions of trespass on the case plead a release, though it is also *competent* to him to rely upon it, in evidence under the general issue. As this course is allowable, so there are reasons of convenience which sometimes dictate its adoption; but the general issue, where capable of being applied, is much the more usual form of plea, and that which, from its generality, is commonly the most advantageous to the defendant. It is also to be observed that both in *assumpsit* and trespass on the case in general, there are some matters in confession and avoidance to which the relaxation of practice above explained does not extend, and which cannot be shown in evidence under the general issue, but must be pleaded in the regular course. These excepted cases, however, are few, and each rests on grounds peculiar to itself. Their enumeration will be found in the books of practice. (Z)²

(Z) See 1 Chitty, 473, 487-9.

¹ Cf. *McCord v. Mech. Nat. Bank*, 84 Ill. 49; *Governor v. Lagow*, 43 id. 135. Special pleas which amount to the general issue may be objected to by special demurrer or motion to strike from the files. *McCord v. Mech. Nat. Bank*, 84 Ill. 49; *Governor v. Logan*, 43 id. 135; Ill. Cent. R. Co. v. *Johnson*, 34 id. 389; *Wadhams v. Swan*, 109 id. 54; *Cushman v. Hayes*, 46 id. 145; *Cook v. Scott*, 1 Gilm. 333.

² *McCord v. Mech. Nat. Bank*, 84 Ill. 49. Matters of justification must

be pleaded specially. *Olsen v. Upsahl*, 69 Ill. 273; id. 299; *Hahn v. Ritter*, 12 id. 81; 1 Addison on Torts, § 531. The defendant may resort to the general issue with notice of special matters of defense, but the practice is not clear, and great care is required in framing the notice. See *Kane v. Sanger*, 14 Johns. 89; *Vaughn v. Havans*, 8 id. 109; cases cited 1 Chitty, Pl. *473; *Burgwin v. Babcock*, 11 Ill. 28; *Sherman v. Dutch*, 16 id. 233.

✓ § 121. *Special pleas.*—On the subject of general issues it remains only to remark that other pleas are ordinarily distinguished from them by the appellation of *special pleas*; and when resort is had to the latter kind, the party is said to plead *specially*, in opposition to pleading the *general issue*. (m) So the *issues* produced upon special pleas as being usually more specific and particular than those of *not guilty, nil debet*, etc., are sometimes described in the books as *special issues*, by way of distinction from the others, which were called *general issues*; (n) the latter term having been afterwards applied, not only to the issues themselves, but to the pleas which tendered and produced them.

✓ § 122. *Of the traverse de injuria.*—There is another species of traverse, which varies from the common form, which, though confined to particular actions and to a particular stage of the pleadings, is of frequent occurrence. It is the traverse *de injuria sua propria, absque tali causa*, or (as it is more compendiously called) the traverse *de injuria*. It always *tenders issue*; but, on the other hand, differs, like many of the general issues, from the common form of a traverse, by denying in general and summary terms, and *not in the words of the allegation traversed*. The following is an example:

PLEA

Of Son Assault Demesne.

In trespass for assault and battery.

And for a farther plea (o) in this behalf, as to the said assaulting, beating, wounding and ill-treating in the said declaration mentioned, the said C. D., by leave of the court here, for this purpose, first had and obtained, according to the form of the statute in such case made and provided, says that the said A. B. ought not to have or maintain his aforesaid action thereof against him, because he says that the said A. B., just before the said time when, etc., to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, with force and arms, made an assault upon him, the said C. D., and would then and there have beaten and ill-treated him, the said C. D., if he had not immediately defended himself against

(m) These terms, it may be remarked, have given rise to the popular denomination of the whole science to which this work relates, which, though properly described as that of *pleading*, is generally known by the name of *special pleading*.

(n) Co. Litt. 126 a; Heath's Maxims, 53; Com. Dig., Pleader (R. 2).

(o) In this case the defendant is supposed to plead more pleas than one. The doctrine of pleading *several pleas* will be explained in a subsequent section.

the said A. B.: wherefore the said C. D. did then and there defend himself against the said A. B., as he lawfully might, for the cause aforesaid; and in so doing did necessarily and unavoidably a little beat, wound and ill-treat the said A. B., doing no unnecessary damage to the said A. B. on the occasion aforesaid. And so the said C. D. saith that if any hurt or damage then and there happened to the said A. B., the same was occasioned by the said assault so made by the said A. B. on him, the said C. D., and in the necessary defense of himself, the said C. D., against the said A. B., which are the supposed trespasses in the introductory part of this plea mentioned, and whereof the said A. B. hath above complained. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action thereof against him.

REPLICATION.

And as to the said plea by the said defendant last above pleaded in bar to the said several trespasses in the introductory part of that plea mentioned, the said A. B. says that, by reason of anything therein alleged, he ought not to be barred from having and maintaining his aforesaid action thereof against the said C. D., because he says that the said C. D. at the said time when, etc., *of his own wrong, and without the cause in his said last mentioned plea alleged*, committed the said several trespasses in the introductory part of that plea mentioned in manner and form as the said A. B. hath above complained; and this he prays may be inquired of by the country. (p)

This species of traverse occurs in the *replication*, in actions of *trespass* and *trespass on the case*, but is not used in any other stage of the pleading. In these actions it is, in general, the *proper* form, wherever the replication traverses the plea in bar. But to this there are the following large exceptions: When the matter to be traversed consists either of matter of *title* or *interest*, or *authority of law*, or *authority in fact*, derived from the opposite party, or matter of *record*, in any of these cases the replication *de injuria* is generally improper, (q)¹ and the traverse should be in the common form, that is, in the words of the allegation traversed.²

(p) 2 Chitty, 523, 642.

(q) Crogate's Case, 8 Rep. 67 a; Doct. Pl. 113, 115. See the law on this subject more fully explained, and the exceptions noticed, 1 Chitty, 578; 1 Arch. 238.

¹ As to the nature of this replication, see *Selby v. Bardon*, 3 B. & Ald. 2; 9 Bing. 756.

² It is proper only to matters of excuse, not to matters of justification. 1 Chitty, Pldg., pp. *591-*594, *626;

✓ § 123. ^{technical.} Of special traverses.— There is still another species of traverse, which differs from the common form, and which will require distinct notice. It is known by the denomination of a *special traverse*. (r) Though formerly in very frequent occurrence, this species has now fallen, in great measure, into disuse; but the subtlety of its texture, its tendency to illustrate the general spirit and character of pleading, and the total dearth of explanation in all the reports and treatises with respect to its principle, seem to justify the consideration of it at greater length, and in a more elaborate manner, than its actual importance in practice demands. Of the special traverse the following is an example:

EXAMPLE 1.

DECLARATION.

In covenant for non-payment of rent; by the heir of a lessor against a lessee.

— to wit, C. D. was summoned to answer A. B., son and heir of E. B., his late father, deceased, of a plea that he keep with the said A. B. the covenant made by the said C. D. with the said E. B., according to the force, form and effect of a certain indenture in that behalf made between them. And thereupon the said A. B., by — —, his attorney, complains: For that whereas the said E. B., at the time of making the indenture hereinafter mentioned, was seized in his demesne as of fee, of and in the premises hereinafter mentioned to be demised to the said C. D. And, being so seized, he, the said E. B., in his life-time, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, by a certain indenture then and there made between the said E. B. of the one part and the said C. D. of the other part (one part of which said indenture, sealed with the seal of the said C. D., the said A. B. now brings here into court,

(r) It is also called a *formal traverse*; or, a *traverse with an absque hoc*.

Gerrish v. Trein, 3 Pick. 124; Allen v. Scott, 13 Ill. 80; Clark v. Downing, 55 Vt. 259; Ayres v. Kelley, 11 Ill. 17; Six Carpenters' Case, 8 Coke, 146; 1 Sm. Ld. Cas. (8th ed.) 257; Smith v. Pierce, 110 Mass. 35. Matters which show the defendant a trespasser *ab initio* must be shown by a special replication new assigning. Hannes v. Edes, 15 Mass. 347; Taylor v. Cole, 3 Term, 292; Ayres v. Kelley, *supra*; McConnell v. Kibb, 33 Ill. 175. Thus, in trespass *quare clausum* with *alia enormia* that the defendant seduced the plaintiff's wife or daughter, if the defendant justify the entry under license the plaintiff must new assign. Moran v. Dawes, 4 Cow. 412; Hubble v. Wheeler, 2 Aik. 539; Bennett v. McIntire, 121 Ind. 131. The form of the special replication. 1 Arch. Nisi Prius, pp. 485-528.

the date whereof is the day and year aforesaid), for the considerations therein mentioned, did demise, lease, set, and to farm let, unto the said C. D., his executors, administrators and assigns, a certain messuage or dwelling-house, with the appurtenances, situate at —, to have and to hold the same unto the said C. D., his executors, administrators and assigns, from the — day of — then last past, to the full end and term of — years thence next ensuing, and fully to be complete and ended, yielding and paying therefor yearly, and every year, to the said E. B., his heirs or assigns, the clear yearly rent or sum of — pounds, payable quarterly, at the four most usual feasts or days of payment of rent in the year; that is to say, on the 25th day of March, the 24th day of June, the 29th day of September and the 25th day of December, in each and every year, in equal portions. And the said C. D. did thereby, for himself, his executors, administrators and assigns, covenant, promise and agree to and with the said E. B., his heirs and assigns, that he, the said C. B., his executors, administrators or assigns, should and would well and truly pay, or cause to be paid, to the said E. B., his heirs or assigns, the said yearly rent or sum of — pounds at the several days and times aforesaid, as by the said indenture, reference being hereunto had, will more fully appear. By virtue of which said demise, the said C. D. afterwards, to wit, on the — day of —, in the year —, entered into the said premises, and was thereof possessed for the said term, the reversion thereof belonging to the said E. B. and his heirs. And he, the said C. D., being so possessed, and the said E. B., being so seized of the said reversion in his demesne as of fee, he, the said E. B., afterwards, to wit, on the — day of —, in the year aforesaid, at — aforesaid, in the county aforesaid, died so seized of the said reversion. After whose decease, the said reversion descended to the said A. B., as son and heir of the said E. B., whereby the said A. B. was seized of the reversion of the said demised premises in his demesne as of fee. And the said A. B. in fact says that he, the said A. B., being so seized, and the said C. D. being so possessed as aforesaid, afterwards, and during the said term, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, a large sum of money, to wit, the sum of — pounds of the rent aforesaid, for divers, to wit, — years of the said term then elapsed, became and was due and owing, and still is in arrear and unpaid, to the said A. B., contrary to the form and effect of the said covenant in that behalf. And so the said A. B. in fact saith that the said C. D., although often requested, hath not kept his said covenant in that behalf, but hath broken the same; and to keep the same hath hitherto wholly refused, and still refuses, to the damage of the said A. B. of — pounds; and therefore he brings his suit, etc.

PLEA.

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says that the said A. B. ought not to have or maintain his aforesaid action against him, because he says that the said E. B., deceased, at the time of the making of the said indenture, was seized in his demesne as of freehold, for the term of his natural life, of and in the said demised premises with the appurtenances, and continued so seized thereof until and at the time of his death; and that, after the making of the said indenture and before the expiration of the said term, to wit, on the — day of —, in the year of our Lord —, at — aforesaid, the said E. B. died; whereupon the term created by the said indenture wholly ceased and determined: *Without this, that*, after the making of the said indenture, the reversion of the said demised premises belonged to the said E. B. and his heirs in manner and form as the said A. B. hath in his said declaration alleged. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action against him. (s)

The substance of this plea is that the father was seized for life only, and therefore that the term terminated at his death, which involves a denial of the allegation in the declaration that the reversion belonged to the father in fee. The defendant's course was therefore to traverse the declaration. (t) But it will be observed that he does not traverse it in the common form. If the *common* traverse were adopted in this case the plea would be: "And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says that the said A. B. ought not to have or maintain his aforesaid action against him, because he says that after the making of the said indenture the said reversion of the said demised premises did not belong to the said E. B. and his heirs in manner and form as the said A. B. hath in his said declaration alleged. And of this the said C. D. puts himself upon the country." But instead of this simple denial and tender of issue the defendant adopts a *special* traverse. This first sets forth the new affirmative matter that E. B. was seized for life, etc.; and then annexes to this the denial that the reversion belonged to him and his heirs by that pe-

(s) 2 Chitty, 500. And see *Boudnell v. Roberts*, 2 Wils. 148; *Palmer v. Elkins*, Lord Ray. 1550.

(t) See Appendix, note (47).

culiar and barbarous formula, *Without this, that, etc.*; and lastly, does not (like a common traverse) *tender issue*, but concludes with the words: "And this the said C. D. is ready to verify, wherefore he prays judgment," etc., which is called a *verification* and *prayer of judgment*,¹ and is the constant conclusion of all pleadings in which issue is not tendered. The affirmative part of the special traverse is called its *inducement*; (u) the negative part is called the *absque hoc*,—those being the Latin words formerly used, and from which the modern expression, *without this*, is translated. The different parts and properties here noticed are all essential to a special traverse, which must always thus consist of an inducement, a denial and a verification. (x) ^{in other words, the plea must conclude to the country.}

By way of farther illustration, and as the foundation for some subsequent remarks on the nature and meaning of a special traverse, it will be necessary here to add some other examples of this form of pleading.

EXAMPLE 2.

PLEA.

In trespass quare clausum fregit.

And for a farther plea, as to the breaking and entering the said close, in which, etc., and the treading down, trampling upon, consuming and spoiling the said grass and herbage, as above supposed to have been done, the said C. D., by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said A. B. ought not to have or maintain his aforesaid action thereof against him, because he says that before the said time when, etc., to wit, on the — day of —, in the year —, one J. N., clerk, prebendary of the prebend of N., in the cathedral church of H., was seized in his demesne, as of fee, in right of the said prebend, of and in certain tenements, whereof the said close in which, etc., then and from thenceforth hitherto hath been parcel. And being so seized before the said time when, etc., to wit, on the day and year last aforesaid, at — aforesaid, in the county afore-

(u) Bac. Ab., Pleas, etc., H. 1.

(x) The denial, however, may be introduced by other forms of expression besides *absque hoc*. *Et non* will suffice. *Bennett v. Filkins*, 1 Saund. 21; *Walters v. Hodges*, Lut. 1035.

¹ See 1 Saund. 103b. Some of the under Hil. Rules, 4 Will. IV., the conclusion is to the country. later American editions of Stephen are misleading as to this point, for

said, by a certain indenture, sealed with the seal of the said I. N. (and now shown to the court here, the date whereof is the day and year last aforesaid), the said I. N. demised the said tenements, with the appurtenances (among other things), to the said C. D., by the name of all his prebend of N. aforesaid, etc., to have and to hold to the said C. D. and his assigns, from the — day of — then next, to the end and term of fifty years thence next following, yielding and paying therefor yearly, during the said term, to the said prebendary and his successors, the sum of — pounds, at the feasts of — and —, by equal portions. By virtue of which demise the said C. D. was possessed (among other things) of the said tenements, with the appurtenances. And being so possessed, one I. H., bishop of —, then being true and undoubted patron and ordinary of the said prebend of N., afterwards, to wit, on the — day of —, in the year —, at —, by his writing, sealed with his common seal (and now to the court here, the date whereof is the day and year last aforesaid), ratified, approved and confirmed the said estate and interest of the said C. D. in the premises. And afterwards one I. E., master of arts, dean of the said cathedral church, and the chapter of the said church for the time being, (y) to wit, on the — day of —, in the year —, at —, by their writing, sealed with their common seal (and now shown to the court here, the date whereof is the day and year last aforesaid), ratified, approved and confirmed the said estate and interest of the said C. D. in the premises. And the said A. B., claiming that said tenements, with appurtenances, by color of a certain charter of demise to him thereof made, for the term of his life, by the said I. N., long before the said demise to the said C. D., in form aforesaid made (whereas nothing of the said tenements, with the appurtenances, ever passed into the possession of the said A. B. by that charter), before the said time when, etc., entered into the said tenements, with the appurtenances; upon whose possession whereof the said C. D., at the said time when, etc., entered into the said tenements with the appurtenances, and broke and entered the said close in which, etc., and trod down, trampled upon, consumed and spoiled the grass and herbage there growing and being, as it was lawful for him to do, for the cause aforesaid; which are the same trespasses in the introductory part of this plea mentioned, and whereof the said A. B. hath above complained. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action thereof against him, etc.

(y) If the bishop happen to be patron as well as ordinary, the confirmation of the dean and chapter, as well as the bishop, is necessary. Co. Litt. 300 b.

REPLICATION.

And as to the said plea, by the said C. D. last above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, the said A. B. says that by reason of any thing therein alleged he ought not to be barred from having and maintaining his aforesaid action thereof against him; because, protesting that the said I. N. did not demise the said tenements, with the appurtenances, to the said C. D., as the said C. D. hath above alleged, for replication, nevertheless, in this behalf, the said A. B. says that the said C. D., on the said — day of —, in the year —, at — aforesaid, in the county aforesaid, brought to the said bishop a certain writing of demise of the said tenements by the said I. N. to the said C. D., and then and there desired the said bishop to confirm the said writing, sealed with the seal of the said I. N., in which writing no number of years was then written, which the said C. D. was to have in the said tenements, which said writing of demise the said bishop then and there confirmed, and sealed the said writing with his seal. And before the said time, when, etc., to wit, on the — day of —, in the year —, at — aforesaid, in the county aforesaid, the said I. N. died. After whose death, and before the said time, when, etc., the said bishop, as the true and undoubted patron and ordinary of the said prebend so being vacant by the death of the said I. N., collated the same on his clerk, the said A. B., and caused him to be justly instituted and inducted, and put in corporal possession of the said prebend. Whereby the said A. B. was seised of the said tenements, with the appurtenances, in his demesne, as of fee, in right of his said prebend, until the said C. D., on the — day of —, in the year —, with force and arms broke and entered the close of the said A. B., at — aforesaid, and trod down, trampled upon, consumed and spoiled the grass and herbage therein to the value of — pounds, as he hath above complained. *Without this*, that the said bishop, by his said writing, ratified, approved and confirmed the estate and interest of the said C. D. in the premises, in manner and form as the said C. D. hath, in his said last mentioned plea, alleged. And this the said A. B. is ready to verify. Wherefore he prays judgment, and his damages by him sustained, by reason of the said trespasses, in the introductory part of that plea mentioned, to be adjudged to him, etc. (z)

In both the preceding examples it will be observed that the *inducement* contains *new* affirmative matter. But a special traverse may also occur in cases where the denial is, in its nature, unconnected with any new affirmative matter that can be stated by way of inducement. Of this the following is an example:

(z) See the precedent, Fl. Gen. 600.

EXAMPLE 3.

PLEA.

In trespass quare clausum fregit.

And for a farther plea in this behalf, as to the breaking and entering the said close, in which, etc., and with feet in walking, treading down, trampling upon, consuming and spoiling the said grass, as above supposed to have been done, the said C. D., by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said A. B. ought not to have or maintain his aforesaid action thereof against him; because he says that one W. F., before and at the same time, when, etc., was, and yet is, seized in his demesne, as of fee, of and in a certain messuage or tenement and lands, with the appurtenances, situate and being at —, in the county aforesaid. And that the said W. F. and all those whose estate he hath, and at the same time when, etc., had of and in the said messuage or tenement and lands, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, and of right ought to have and use, for himself and themselves, and his and their farmers and tenants, occupiers of the said messuage or tenement and lands, with the appurtenances, for the time being, a certain way from the said messuage or tenement and lands, with the appurtenances, into, through and over the said close, in which, etc., unto a certain place called —; and so from thence back again into, through and over the said close, in which, etc., unto the said messuage or tenement and lands, with the appurtenances, to go, return, pass and repass on foot at all times of the year, at his and their free will and pleasure, as to the said messuage or tenements and lands, with the appurtenances belonging and appertaining. Wherefore the said C. D., as the servant of the said W. F. and by his command, at the said several times when, etc., having occasion to use that way, broke and entered the said close, in which, etc., and passed and repassed on foot through and over the said way there, using the said way for the purpose and on the occasion aforesaid, as it was lawful for him to do for the cause aforesaid. And in so doing the said C. D. necessarily and unavoidably at the said time, when, etc., with his feet in walking, trod down, trampled upon, consumed and spoiled a little of the grass then growing and being in the said way there; doing as little damage as he possibly could to the said A. B. on that occasion. Which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said A. B. hath above complained. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action thereof against him, etc.

REPLICATION.

And as to the said plea, by the said C. D. last above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, the said A. B. says that by reason of any thing therein alleged he ought not to be barred from having and maintaining his aforesaid action thereof against him; because, protesting that the said I. N. did not demise the said tenements, with the appurtenances, to the said C. D., as the said C. D. hath above alleged, for replication, nevertheless, in this behalf, the said A. B. says that the said C. D., on the said — day of —, in the year —, at — aforesaid, in the county aforesaid, brought to the said bishop a certain writing of demise of the said tenements by the said I. N. to the said C. D., and then and there desired the said bishop to confirm the said writing, sealed with the seal of the said I. N., in which writing no number of years was then written, which the said C. D. was to have in the said tenements, which said writing of demise the said bishop then and there confirmed, and sealed the said writing with his seal. And before the said time, when, etc., to wit, on the — day of —, in the year —, at — aforesaid, in the county aforesaid, the said I. N. died. After whose death, and before the said time, when, etc., the said bishop, as the true and undoubted patron and ordinary of the said prebend so being vacant by the death of the said I. N., collated the same on his clerk, the said A. B., and caused him to be justly instituted and inducted, and put in corporal possession of the said prebend. Whereby the said A. B. was seised of the said tenements, with the appurtenances, in his demesne, as of fee, in right of his said prebend, until the said C. D., on the — day of —, in the year —, with force and arms broke and entered the close of the said A. B., at — aforesaid, and trod down, trampled upon, consumed and spoiled the grass and herbage therein to the value of — pounds, as he hath above complained. *Without this, that* the said bishop, by his said writing, ratified, approved and confirmed the estate and interest of the said C. D. in the premises, in manner and form as the said C. D. hath, in his said last mentioned plea, alleged. And this the said A. B. is ready to verify. Wherefore he prays judgment, and his damages by him sustained, by reason of the said trespasses, in the introductory part of that plea mentioned, to be adjudged to him, etc. (2)

In both the preceding examples it will be observed that the *inducement* contains *new* affirmative matter. But a special traverse may also occur in cases where the denial is, in its nature, unconnected with any new affirmative matter that can be stated by way of inducement. Of this the following is an example:

(2) See the precedent, Fl. Gen. 609.

EXAMPLE 3.

PLEA.

In trespass quare clausum fregit.

And for a farther plea in this behalf, as to the breaking and entering the said close, in which, etc., and with feet in walking, treading down, trampling upon, consuming and spoiling the said grass, as above supposed to have been done, the said C. D., by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said A. B. ought not to have or maintain his aforesaid action thereof against him; because he says that one W. F., before and at the same time, when, etc., was, and yet is, seized in his demesne, as of fee, of and in a certain messuage or tenement and lands, with the appurtenances, situate and being at —, in the county aforesaid. And that the said W. F. and all those whose estate he hath, and at the same time when, etc., had of and in the said messuage or tenement and lands, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, and of right ought to have and use, for himself and themselves, and his and their farmers and tenants, occupiers of the said messuage or tenement and lands, with the appurtenances, for the time being, a certain way from the said messuage or tenement and lands, with the appurtenances, into, through and over the said close, in which, etc., unto a certain place called —; and so from thence back again into, through and over the said close, in which, etc., unto the said messuage or tenement and lands, with the appurtenances, to go, return, pass and repass on foot at all times of the year, at his and their free will and pleasure, as to the said messuage or tenements and lands, with the appurtenances belonging and appertaining. Wherefore the said C. D., as the servant of the said W. F. and by his command, at the said several times when, etc., having occasion to use that way, broke and entered the said close, in which, etc., and passed and repassed on foot through and over the said way there, using the said way for the purpose and on the occasion aforesaid, as it was lawful for him to do for the cause aforesaid. And in so doing the said C. D. necessarily and unavoidably at the said time, when, etc., with his feet in walking, trod down, trampled upon, consumed and spoiled a little of the grass then growing and being in the said way there; doing as little damage as he possibly could to the said A. B. on that occasion. Which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the said A. B. hath above complained. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action thereof against him, etc.

REPLICATION.

And as to the said plea by the said C. D. last above pleaded, as to the several trespasses in the introductory part of that plea mentioned, the said A. B. says that by reason of anything therein alleged he ought not to be barred from having and maintaining his aforesaid action thereof against him; because the said A. B. says that he, the said C. D., of his own wrong, broke and entered the said close in which, etc., and with feet in walking trod down, trampled upon, consumed and spoiled the grass there then growing and being, as the said A. B. hath above complained. *Without this, that* the said W. F., and all those whose estate he hath, and at the said several times when, etc., had of and in the said messuage, or tenement and lands, with the appurtenances, from time whereof the memory of man is not to the contrary, have had and used, and been accustomed to have and use, and of right ought to have and use, for himself and themselves, and his and their farmers and tenants, occupiers of the said messuage, or tenement and lands, with the appurtenances, for the time being, a certain way from the said messuage, or tenement and lands, with the appurtenances, into, through and over the said close, in which, etc., unto a certain place called —, and so from thence back again into, through and over the said close, in which, etc., unto the said messuage, or tenement and lands, with the appurtenances, to go, return, pass and repass on foot at all times of the year, at his and their free will and pleasure, as to the said messuage, or tenement and lands, with the appurtenances, belonging and appertaining, in manner and form as the said C. D. hath in his said last-mentioned plea alleged. And this the said A. B. is ready to verify. Wherefore he prays judgment, and his damages by him sustained by reason of the said trespasses, in the introductory part of that plea mentioned, to be adjudged to him, etc. (a)¹

In this last example it will be observed that there is *no* new affirmative matter contained in the inducement. For it consists of a mere repetition of the trespasses that had been antecedently alleged in the declaration, and an allegation that they were committed *de injuria sua propria*, or of the defendant's own wrong. In this respect, therefore, viz., in the want of new affirmative matter in the inducement, this last example differs from the two first given.

The regular method of pleading in *answer* to a special

(a) See the precedents, 9 Went. 233, 238.

¹ For the precedents, see *Wilcox v. Kinzie*, 3 Scam. 218; *Yates' Pl* 144; *Prosser v. Woodward*, 1 Wend. 205.

traverse is to tender issue upon it, with a repetition of the allegation traversed. Accordingly, in the first example, issue would be tendered in the replication, thus:

REPLICATION.

To the plea, p. 190.²⁴⁵

And as to the said plea by the said C. D. above pleaded, the said A. B. says that by reason of anything therein alleged he ought not to be barred from having and maintaining his aforesaid action against the said C. D., because the said A. B. says that after the making of the said indenture the reversion of the said demised premises belonged to the said E. B. and his heirs, in manner and form as the said A. B. hath in said declaration above alleged. And this he prays may be inquired of by the country.

And so in the remaining examples, issue would be tendered in the rejoinder by a similar repetition of the matter which the traverse denies.

✓ § 124. **Effect and object of special traverses.**— It will be perceived, therefore, that the *effect* of a special traverse is to postpone the issue to one stage of the pleading later than it would be attained by a traverse in the common form. For, if the defendant had, in the first example, traversed without an inducement, and concluded to the country, it would only have remained for the plaintiff to add the *similiter*— so that the issue would have been joined in the replication. On the other hand, upon the plan of special traverse, the issue is not tendered till the replication; and consequently the *similiter* still remains to be added in a rejoinder by the defendant.

The *use and object* of a special traverse is the next subject for consideration. Though this relic of the subtle genius of the ancient pleaders has now fallen (as above stated) into comparative disuse, it is still of occasional occurrence; and it is remarkable, therefore, that no author should have hitherto offered any explanation of the objects for which it was originally devised, and in a view to which it continues to be, in some cases, adopted. (b) The following remarks are submitted as those which have occurred to the writer of this work on a subject thus barren of better authority. The general design of a special traverse, as distinguished from a common one, is

(b) See Appendix, note (48).

to *explain or qualify the denial*, instead of putting it in the direct and absolute form; and there were several different views, in reference to one or other of which the ancient pleaders seem to have been induced to adopt this course.

First. A simple or positive denial may, in some cases, be rendered improper by its opposition to some general rule of law. Thus, in the example of special traverse first above given, it would be improper to traverse in the common form, viz.: "that after the making of the said indenture the reversion of the said demised premises did not belong to the said E. B. and his heirs," etc., because, by a rule of law, a tenant is precluded (or, in the language of pleading, *estopped*) from alleging that his lessor had no title in the premises demised; (c) and a general assertion that the reversion did not belong to him and his heirs would seem to fall within the prohibition of that rule. But a tenant is not by law estopped to say that his lessor had only a *particular estate*, which has since expired. (d) In a case, therefore, in which the declaration alleged a seisin in fee in the lessor, and the nature of the defense was that he had a particular estate only (e. g., an estate for life), since expired, the pleader would resort, as in the first example, to a special traverse—setting forth the lessor's limited title by way of inducement, and traversing his seisin of the reversion in fee under the *absque hoc*. He thus would avoid the objection that might otherwise arise on the ground of estoppel.

Secondly. A common traverse may sometimes be inexpedient, as involving in the issue in *fact* some question which it would be desirable rather to develop and submit to the judgment of the court as an issue in *law*. This may be illustrated by the second example of special traverse above given. In that case it would seem that a lease not expressing any certain term of demise had been brought to the ordinary for his confirmation; that he had accordingly confirmed it in that shape under his seal; and that the instrument was afterwards filled up as a lease for fifty years. The party relying upon this lease states that the demise was to the defendant for the term of fifty years, and that the ordinary "ratified, approved and

(c) *Black v. Foster*, 8 T. R. 487.

(d) *Ibid.*

confirmed his estate and interest in the premises." (e) If the opposite party were to traverse in the common form — "that the ordinary did not ratify, approve and confirm his estate and interest in the premises, etc.," and so tender issue of fact on that point — it is plain that there would be involved in such issue the following question of *law*, viz.: whether the confirmation by the ordinary of a lease in which the length of the term is not at the time expressed be valid? This question would therefore fall under the decision of the jury, to whom the issue in fact is referred, subject to the direction of the judge presiding at *nisi prius*, and the ultimate revision of the court in bank. Now it may, for many reasons, be desirable that, without going to a trial, this question should rather be brought before the court in the first instance, and that for that purpose an issue in *law* should be taken. The pleader, therefore, in such a case, would state the circumstances of the transaction in an inducement — substituting a special for a common traverse. As the whole facts thus appear on the face of the pleading, if his adversary means to contend that the confirmation was under the circumstances valid in point of law, he is enabled by this plan of special traverse to raise the point by demurring to the replication, on which demurrer a question of law arises for the adjudication of the court.

By these reasons and sometimes by others also, which the reader, upon examination of different examples, may, after these suggestions, readily discover for himself, the ancient pleader appears to have been actuated in his frequent adoption of an inducement of new affirmative matter, tending to explain or qualify the denial. (f) But though these reasons seem to show the purpose of the *inducement*, they do not account for the two other distinctive features of the special traverse, viz., the *absque hoc*, and the *conclusion with a verification*. For it will naturally suggest itself that the affirmative matter might, in each of the above cases, have been pleaded *per se*, without the addition of the *absque hoc*. So, whether the *absque hoc* were added or not, the pleading might,

(e) This case would seem to have arisen before the restraining statutes; since which a lease by ecclesiastical persons, even with confirmation, is good for no longer period than twenty-one years, or three lives. 2 Bl. Com. 320.

(f) See Appendix, note (49).

consistently with any of the above reasons, have *tendered issue* like a common traverse instead of concluding with a verification. These latter forms were dictated by *other* principles. The direct denial under the *absque hoc* was rendered necessary by this consideration — that the affirmative matter taken alone would be only an *indirect* (or, as it is called in pleading, *argumentative*) denial of the precedent statement; and by a rule which will be considered in its proper place hereafter, all *argumentative* pleading is prohibited. In order, therefore, to avoid this fault of *argumentativeness*, the course adopted was to follow up the explanatory matter of the inducement with a *direct* denial. (*g*) Thus, to allege, as in the first example, that E. B. was seised for life, would be to deny by implication, but by implication *only*, that the reversion belonged to him in fee; and therefore, to avoid argumentativeness, a direct denial that the reversion belonged to him in fee is added under the formula of *absque hoc*. (*h*) With respect to the *verification*, this conclusion was adopted in a special traverse in a view to another rule, of which there will also be occasion to speak hereafter, viz., that *wherever new matter is introduced in a pleading, it is improper to tender issue, and the conclusion must consequently be with a verification*. The inducement setting forth new matter makes a verification necessary in conformity with that rule.

The special traverse having, with these views and in this manner, been introduced into the system of pleading, grew so much into fashion as to be frequently adopted even in cases to which the original reasons of the form were inapplicable — that is, to cases where the intended denial was, in its nature, simple and absolute, and connected with no new matter. This will be illustrated by the last of the preceding examples. In this, the defendant having pleaded a right of way, the object of the replication is merely to deny that the right of way existed; and there is no reason why this should not be done in the simple form of a common traverse, viz.: “that the said W. F., and all those whose estate, etc., have not had and used, etc., a certain way, etc., in manner and form as alleged;” concluding to the country. But the fashion of traversing spe-

(*g*) 3 Reeves' Hist. 432; Bac. Ab., Pleas, etc., H. 1; Courtney v. Phelps, Sid. 301; Herring v. Blacklow, Cro. Eliz. 30; 10 Hen. 6, 7, pl. 21.

(*h*) See Appendix, note (50).

cially led the ancient pleaders, in such a case as this also, to use the inducement, the *absque hoc*, and the verification; and because the nature of the case afforded no allegation of new matter, as introductory to the denial,—in lieu of this, a kind of inducement was adopted, containing, in fact, no new matter, but a mere repetition of the original complaint, viz., “that the defendant, *of his own wrong, broke and entered the close*, etc. Without this, that, etc.”¹

§ 125. Application of the special traverse.—Having now explained the form, the effect and the use and object of a special traverse, it remains to show in what cases this method of pleading is or ought to be applied at the present day. First, it is to be observed that this form was at *no* period applicable to *every* case of denial at the pleasure of the pleader. There are many cases of denial to which the plan of special traverse has never been applied; and which have always been and still are the subjects of traverse in the common form exclusively. (i)² These it is not easy to enumerate or define; they are determined by the course of precedent, and in that way become known to the practitioner. On the other hand, in many cases where the special traverse used anciently to occur, it is now no longer practiced. This relates principally to that species of it which is illustrated by the last example. Even when the *formula* was most in repute, the use of *this* species does not appear to have been regarded as matter of *necessity*; and in cases which admit or require no allegation of new matter, we find the special and the common traverse to have been indifferently used by the pleaders of those days. (k) But in modern

(i) *Horne v. Lewin*, *Ld. Ray*. 641.

(k) *Rast. Ent.* 622. And see *Horne v. Lewin*, 1 *Lord Ray*. 641.

¹ The learning upon the subject of the special traverse consists merely in the application of the principles elucidated by Stephen to new cases. See *Wilcox v. Kinzer*, 8 *Scam.* 218; *Prosser v. Woodward*, 21 *Wend.* 205; *Breck v. Blanchard*, 20 *N. H.* 323, 51 *Am. Dec.* 222. “Such,” says Judge Comegys in a recent case, “is the law as laid down in one of the most reliable of text-books upon any subject, and by an author who has given more attention to the special traverse, such as that under consideration, than any one who has written of pleading.” *Thomas v. Black* (1889), 8 *Houst. (Del.)* 507. See, also, *Douglas v. Hennessy*, 15 *R. I.* 272. The special traverse is used in equity pleading. *Litch v. Clinch*, 136 *Ill.* 410.

² See *Stennel v. Hogg*, 1 *Saund.* 223; *Mayor of Oxford v. Richardson*, 4 *Term R.* 437.

times the special traverse, without an inducement of new matter, has been considered not only as *unnecessary*, but as frequently *improper*. As the taste in pleading gradually simplified and improved, the prolix and dilatory effect of a special traverse brought it into disfavor with the courts; and they began not only to enforce the doctrine that the common form might allowably be substituted in cases where there was no inducement of new matter, but often intimated their preference of that form to the other. (l) Afterwards they appear to have gone farther, and to have established in favor of the common plan of traverse, in cases where there is no allegation of new matter, the following rule of distinction: *that where the whole substance of the last pleading is denied, the conclusion must be to the country* (or, in other words, the traverse must be in the common form); *but where one of several facts only is the subject of denial, the conclusion may be either to the country or with a verification* (that is, the traverse may be either common or special), *at the option of the pleader.* (m) Thus, in the last example, the special traverse would apparently now be no longer allowable; because the replication, denying the right of way, denies the whole substance of the plea. It is not easy to trace either the original authority, or even a very satisfactory reason, for this distinction. It does not appear to coincide with the practice at a former period, which certainly allowed special traverses, though without an inducement of new matter, in many cases where the whole substance of the pleading was denied; and its true origin is perhaps to be referred very much to the inclination of the courts to discourage this formula. From the time that the special traverse thus fell into disrepute it has been much neglected, even in cases where legally allowable; and it now rarely occurs in any instance where there is no inducement of new matter, although the denial relate to one out of several facts only. This change of practice, however, is very recent, having been effected within the memory of many living practitioners. (n) With respect to the *other* kind

(l) *Robinson v. Bayley*, 1 Burr. 320.

(m) See 1 Saund. 103, a, b; Bac. Abr., Pleas, etc., p. 381, in *notis*; *Smith v. Dovers*, 2 Doug. 420.

(n) See 1 Chitty, 593, and 1 Saund. 103 a.

of special traverse, viz., that which is attended with an inducement of new matter, as illustrated in the two first examples, the case is very different. This was originally devised, as has been shown, for certain reasons of convenience or necessity; and those reasons still occasionally operate the same way. However, in the general decline of the method of special traverse, there is felt in practice a great disinclination to adopt in any case whatever, without a clear reason for doing so, this discredited form; and this more particularly in a view to the disadvantages with which it is attended. These disadvantages consist not only in prolixity and delay, but in the additional inconvenience that the inducement tends to open the real nature of the party's case, by giving notice to his adversary of the precise grounds on which the denial proceeds; and thus facilitates to the latter the preparation of his proofs, or otherwise guides him in his farther proceedings. For these reasons the special traverse is perhaps daily becoming more rare; and even though the case be such as would admit of an inducement of new matter explanatory of the denial, the usual course is to omit any such inducement and to make the denial in an absolute form, with a tender of issue;—thus substituting the common for the special formula. The latter, however, appears to be still always allowable when the case is such as admits of an inducement of new matter, except in certain instances before noticed, to which, by the course of precedent, the common form of traverse has been always exclusively applied. (o) And where allowable it should still be occasionally adopted, in view to the various grounds of necessity or convenience by which it was originally suggested. Accordingly it is apprehended that, in the two first examples, a special traverse would be as proper at the present day as it was at the period when the precedents first occurred.

To complete our view of the nature of a special traverse, it will be necessary now to advert to certain principles laid down in the books relative to this form.

§ 126. Qualities of the special traverse.—*First, it is a rule that the inducement should be such as in itself amounts to*

(o) *Supra*, p. 248.

a sufficient answer in substance to the last pleading. (p) For (as has been shown) it is the use and object of the inducement to give an explained or qualified denial; that is, to state such circumstances as tend to show that the last pleading is not true; the *absque hoc* being added merely to put that denial in a positive form which had previously been made in an indirect one. Now, an indirect denial amounts in substance to an answer; and it follows, therefore, that an inducement, if properly framed, must always in itself contain, without the aid of the *absque hoc*, an answer in substance to the last pleading. Thus, in the first example, the allegation that E. B. was seised for life, and that that estate is since determined, is in itself, in substance, a sufficient answer, as denying by implication that the fee descended from E. B. on the plaintiff. That sort of special traverse containing no new matter in the inducement, as in the last example, is no exception to this rule. Thus, to say, as in that example, that the defendant, *of his own wrong*, broke the close, etc., is of itself an answer; for it indirectly denies the right of way.

It follows from the same consideration, as to the object and use of a special traverse, that the answer given by the inducement can properly be of *no other* nature than that of an indirect denial. Accordingly, we find it decided, in the first place, *that it must not consist of a direct denial*. Thus, the plaintiff being bound by recognizance to pay J. Bush 300*l.* in six years, by 50*l.* per annum at a certain place, alleged that he was ready every day at that place to have paid to Bush one of the said instalments of 50*l.*, but that Bush was not there to demand and receive it. To this the defendant pleaded that J. Bush was ready at the place to receive the 50*l.* *absque hoc*, that the plaintiff was there ready to have paid it; on which the plaintiff demurred on the ground that the inducement alleging Bush to have been at the place ready to receive, contained a direct denial of the plaintiff's precedent allegation that Bush was *not* there, and should therefore have concluded to the country without the *absque hoc*; and judgment was given accordingly for the plaintiff. (q) Again, as

(p) Bac. Ab. (H.) 1.; Com. Dig., Pleader (G. 20); Anon., 8 Salk. 353; *Dike v. Ricks*, Cro. Car. 336.

(q) *Hughes v. Phelps*, Yelv. 38; Cro. Eliz. 755; S. C., and see 36 Hen. 6, 15. N. B.—In the report of the above case in Cro. Eliz., there is some inaccuracy in the manner in which the

the answer given by the inducement must not be a *direct denial*, so it must not be *in the nature of a confession and avoidance*. (r) Thus, if the defendant makes title as assignee of a term of years of A., and the plaintiff, in answer to this, claims under a prior assignment to himself from A. of the same term, this is a confession and avoidance; for it admits the assignment to the defendant, but avoids its effect by showing the prior assignment. Therefore, if the plaintiff pleads such assignment to himself by way of inducement, adding, under an *absque hoc*, a denial that A. assigned to the defendant, this special traverse is bad. (s) The plaintiff should have pleaded the assignment to himself as in confession and avoidance, without the traverse.

Second. Again, it is a rule with respect to special traverses, that the opposite party has no right to traverse the inducement, (t) or (as the rule is more commonly expressed) *that there must be no traverse upon a traverse*. (u) Thus, in the first example, if the replication, instead of taking issue on the traverse (as in page 245), had traversed the inducement, either in the common or the special form, denying that E. B., at the time of making the indenture, was seised in his demesne as of freehold for the term of his natural life, etc., such replication would have been bad as containing a traverse upon a traverse. The reason of this rule is clear and satisfactory. By the first traverse, a matter is denied by one of the parties which had been alleged by the other, and which, having once alleged it, the latter is bound to maintain instead of prolonging the series of the pleading and retarding the issue by resorting to a new traverse. However, this rule is open to an important exception, viz.: *that there may be a traverse upon a traverse when the first is a bad one*; (x) or (in other words) if the denial under the *absque hoc* of the first traverse be insufficient in law, it may be passed by and a new traverse taken on

ground of the decision is expressed,—the words *non obtulit* being apparently used by mistake for *paratus fuit*.

(r) Com. Dig., Pleader, G. 8; *Lambert v. Cook*, Lord Ray. 238; *Heller v. Whytler*, Cro. El. 650.

(s) Com. Dig., Pleader, G. 8; *Heller v. Whytler*, Cro. El. 650.

(t) Anon., 3 Salk. 338.

(u) Com. Dig., Pleader, G. 17; Bac. Ab., Pleas, etc., H. 4; *The King v. Bishop of Worcester*, Vaughan, 62; *Digby v. Fitzharbert*, Hob. 104.

(x) Com. Dig., Pleader (G. 18, 19): *Thrale v. Bishop of London*, 1 H. Bl. 376; *Richardson v. Mayor of Oxford*, 2 H. Bl. 186; *King qui tam v. Bolton*, Str. 116.

the inducement. Thus, in an action of prohibition, the plaintiff declared that he was elected and admitted one of the common council of the city of London; but that the defendants delivered a petition to the court of common council complaining of an undue election, and suggesting that they themselves were chosen; whereas (the plaintiff alleged) the common council had no jurisdiction to examine the validity of such an election, but the same belonged to the court of the mayor and aldermen. The defendants pleaded that the common council, time out of mind, had authority to determine the election of common councilmen; and that the defendants being duly elected, the plaintiff intruded himself into the office; whereupon the defendants delivered their petition to the common council, complaining of an undue election; *without this, that* the jurisdiction to examine the validity of such election belonged to the court of the mayor and aldermen. The plaintiff replied by traversing the inducement; that is, he pleaded that the common council had not authority to determine the election of common councilmen, concluding to the country. To this the defendant demurred, and the court adjudged that the first traverse was bad, because the question in this prohibition was not whether the court of aldermen had jurisdiction, but whether the common council had; and that the first traverse being immaterial the second was well taken. (y)

As the inducement cannot, when the denial under the *absque hoc* is sufficient in law, be *traversed*, so for the same reasons it cannot be answered by a *pleading in confession and avoidance*. But, on the other hand, if the denial be insufficient in law, the opposite party has then a right to plead in confession and avoidance of the inducement as well as to traverse it; or he may *demur* to the whole traverse for the insufficiency of the denial.

§ 127. **The issue tendered on a proper special traverse must be accepted.**—As the inducement of a special traverse, when the denial under the *absque hoc* is sufficient, can neither be traversed nor confessed and avoided, it follows that there is, in that case, *no* manner of *pleading* to the inducement. The only way, therefore, of answering a good special traverse is to plead to the *absque hoc*, which is done by tendering issue

on such denial in the form already explained at page 245.¹ But though there can be no *pleading* to an inducement when the denial under the *absque hoc* is sufficient, yet the inducement may be open, in that case, to exceptions in point of *law*. If it be faulty in any respect, as (for example) in not containing a sufficient answer in substance, or in giving an answer by way of direct denial, or by way of confession and avoidance, the opposite party may demur to the whole traverse, though the *absque hoc* be good, for this insufficiency in the inducement. (z)

The *different kinds or forms of traverse* having been now explained, it will be proper next to advert to certain principles which belong to *traverses in general*.

✓ § 128. *Traverses in general*.—The first of these that may be mentioned is that it is the nature of a traverse to deny the allegation in the *manner and form* in which it is made, and therefore to put the opposite party to prove it to be true in *manner and form* as well as in general effect. Accordingly, it has been shown in the first chapter, (a) that he is often exposed at the trial to the danger of a *variance*, for a slight deviation in his evidence from his allegation. This doctrine of *variance* we now perceive to be founded on the strict quality of the traverse here stated. It has been explained, however, in the same place, that this strictness is so far modified that it is, in general, sufficient to prove *accurately the substance* of the allegation, and that a deviation in point of *mere form*, or *in matter quite immaterial*, will be disregarded. On this subject of variance, or the degree of strictness with which, in different instances, the traverse puts the fact in issue, there are a great number of adjudged cases involving much nicety of distinction; but it does not belong to this work to enter into it more fully. The general principle is that which is here stated, that the traverse brings the fact into question according to the *manner and form in which it is alleged*; and that the opposite party must consequently prove that, in all *substantial points* at least, it is *accurately true*. The existence of this principle is indicated by the

(z) Com. Dig., Pleader (G. 22); *Toden v. Haines*, Comb. 245.

(a) *Supra*, p. 175.

¹ *Prosser v. Woodward*, 21 Wend. 205; *Thomas v. Black*, 8 Houst. 507.

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wording of a traverse, which, when in the negative, generally denies the last pleading, *modo et forma*, "in manner and form as alleged." This will be found to be the case in all the preceding examples, except in the general issue *non est factum*, and the replication *de injuria*, which are almost the only negative traverses that are not pleaded *modo et forma*. These words, however, though usual, are said to be in no case strictly essential, so as to render their omission cause of demurrer. (b) ¹

It is naturally a consequence of the principle here mentioned, that great accuracy and precision in adapting the allegation to the true state of the fact are observed in all well-drawn pleadings; the vigilance of the pleader being always directed to these qualities, in order to prevent any risk of *variance*, or failure of proof at the trial, in the event of a traverse by the opposite party.

§ 129. Again, with respect to all traverses, it is laid down as a rule that a traverse must not be taken upon matter of law. (c)² For a denial of the law involved in the precedent pleading is, in other words, an exception to the sufficiency of that pleading in point of law, and is therefore within the scope and proper province of a *demurrer*, and not of a *traverse*. Thus where, to an action of trespass for fishing in the plaintiff's fishery, the defendant pleaded that the *locus in quo* was an arm of the sea, in which every subject of the

(b) Com. Dig., Pleader (G. 1); Nevil and Cook's Case, 2 Leo. 5.

(c) 1 *Saund*, 28; *Doct. Pl.* 351; *Kenicot v. Bogan*, *Yelv.* 200; *Priddle & Napper's Case*, 11 *Rep.* 10 b; *Richardson v. Mayor of Oxford*, 2 *H. Bl.* 182.

¹ *Bradley v. Barber*, 65 Ill. 481; *Parvis v. Truax*, 7 Houst. 574. All of the systems of pleading require substantially the same thing, viz.: that the substantial material facts shall be stated on either side, and that the party shall confine his proof to his allegations. The code, quite as strictly as the common-law states, requires that each party shall proceed upon a definite theory and adhere to it. He is not allowed to plead one case and prove another. *Fish v. Cleveland*, 83 Ill. 238; *Anderson v. Oscamp (Ind.)*, 85 N. E. Rep. 707; *Supervisors v. Decker*, 30 Wis. 624; *Ætna Powder Co. v. Hildebrand (Ind.)*, 87 N. E. Rep. 136; *Solomon v. Vernon*, 31 Minn. 205; *Heath v. Frackleton*, 20 Wis. 370, 91 Am. Dec. 405; *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 672; *Terry v. Munger*, 121 N. Y. 161.

² *Maners v. Henry (Ala.)*, 11 S. Rep. 410; *Safford v. Miller*, 59 Ill. 205. A foreign law and a city ordinance are facts to be pleaded. *Bowman v. St. John*, 43 Ill. 237; *Kanhouse v. Lexington*, 12 Ill. App. 318.

realm had the liberty and privilege of free fishing; and the plaintiff, in his replication, traversed that in the said arm of the sea every subject of the realm had the liberty and privilege of free fishing, this was held to be a traverse of a mere inference of *law*, and therefore bad. (d) Upon the same principle, if a matter be alleged in pleading, "by reason whereof" (*virtute cujus*) a certain legal inference is drawn,—as that the plaintiff "became seized," etc., or the defendant "became liable," etc.,—this *virtute cujus* is not traversable; (e) because, if it be intended to question the facts from which the seisin or liability is deduced, the traverse should be applied to the facts and to those only; and, if the legal inference be doubted, the course is to demur.¹ But, on the other hand, where an allegation is *mixed of law and fact*, it may be traversed. (f)² For example, in answer to an allegation that a man was "taken out of prison by virtue of a certain writ of *habeas corpus*," it may be traversed that he was "taken out of prison by virtue of that writ." (g) So where it was alleged in a plea, that, in consequence of certain circumstances therein set forth, it belonged to the wardens and commonalty of a certain body corporate to present to a certain church, being vacant, in their turn, being the second turn; and this was answered by a special traverse,—*without this that* it belonged to the said wardens and commonalty to present to the said church, at the second turn, when the same became vacant, etc., in manner and form as alleged,—the court held the traverse good, as not applying to a *mere* matter of law, "but to a matter of law, or rather right, resulting from facts." (h) So it is held, upon the same principle, that traverse may be taken upon an

(d) *Richardson v. Mayor of Oxford*, 2 H. Bl. 182.

(e) *Doct. Pl.* 351; *Priddle & Napper's Case*, 11 Rep. 10 b.

(f) 1 *Saund.* 23, note 5, and see the instances cited; *Bac. Ab., Pleas, etc.*, p. 390, note b (5th ed.); *Beal v. Simpson*, 1 Lord Ray. 412; *Grocer's Co. v. Archbishop of Canterbury*, 3 Wils. 214.

(g) *Beale v. Simpson*, 1 Lord Ray. 412; *Treby, C. J.*, cont.

(h) *Grocer's Co. v. Archbishop of Canterbury*, 3 Wils. 214.

¹ *State v. School Board*, 76 Wis. 177, 7 L. R. A. 388; *Bennett v. McIntire*, 121 Ind. 231, 6 L. R. A. 736; *Ebersole v. First Nat. Bank*, 86 Ill. App. 267; *Millard v. Baldwin*, 8 Gray, 464; *Kellogg v. Larkin*, 8 Penn. 123. ² A plea which presents a mixed question of law and fact is bad, because it is not triable by jury. 1 *Chitty Pl.* (7th Am. ed.) 573; *Clay F. & M. Ins. Co. v. Wusterhausen*, 75 Ill. 285.

allegation that a certain person obtained a certain church by simony. (2)¹

§ 130. It is also a rule that a traverse must not be taken upon matter not alleged. (k)² The meaning of this rule will be sufficiently explained by the following cases: A woman brought an action of debt on a deed, by which the defendant obliged himself to pay her 200*l.* on demand if he did not take her to wife, and alleged in her declaration that though she had tendered herself to marry the defendant, he refused and married another woman. The defendant pleaded that, after making the deed, he offered himself to marry the plaintiff, and she refused; *absque hoc*, "that he refused to take her for his wife before she had refused to take him for her husband." The court was of opinion that this traverse was bad, because there had been no allegation in the declaration "that the defendant had refused before the plaintiff had refused," and therefore the traverse went to deny what the plaintiff had not affirmed. (l) The plea in this case ought to have been in *confession and avoidance*, stating merely the affirmative matter, that before the plaintiff offered the defendant offered; and that the plaintiff had refused him, and omitting the *absque hoc*. Again, in an action of debt on bond against the defendant, as *executrix* of J. S., she pleaded in abatement that J. S. died *intestate*, and that *administration* was granted to her. On demurrer it was objected that she should have gone on to traverse "that she meddled as executrix before the administration granted;" because, if she so meddled, she was properly charged as executrix, notwithstanding the subsequent grant of letters of administration. But the court held the plea good in that respect. And Holt, C. J., said "that if the defendant had taken such traverse it had made her plea vitious; for it is enough for her to show that the plaintiff's writ ought to abate, which she has done in showing that she is chargeable only by

(i) *Ibid.*; Rast. Ent. 532 a.

(k) 1 Saund. 312 d, note 4; Doct. Pl. 358; *Crosse v. Hunt*, Carth. 99; *Powers v. Cook*, 1 Lord Ray. 68; 1 Salk. 298.

(l) *Crosse v. Hunt*, Carth. 99.

¹ *Duggan v. Wright*, 157 Mass. 228. the facts of the opposite pleading See a discussion of the subject in nor confesses and avoids them is *Lucas v. Mockels*, 4 Bing. 729. bad. *Landis v. People*, 39 Ill. 79.

² A plea which neither traverses

another name. Then, as to the traverse, that she did not administer as executrix before the letters of administration were granted, it would be to traverse what is not alleged in the plaintiff's declaration; which would be against a rule of law that a man shall never traverse that which the plaintiff has not alleged in his declaration." (m) There is, however, the following exception to this rule, viz.: *that a traverse may be taken upon matter which, though not expressly alleged, is necessarily implied.* (n)¹ Thus, in replevin for taking cattle, the defendant made cognizance (o) that A. was seised of the close in question, and by his command the defendant took the cattle damage feasant. The plaintiff pleaded in bar that he himself was seised of one-third part, and put in his cattle, *absque hoc*, "that the said A. was *sole* 'seised.' " On demurrer it was objected that this traverse was taken in matter not alleged,—the allegation being that A. was *seised*, not that A. was *sole* seised. But the court held that in the allegation of seisin that of sole seisin was necessarily implied, and that whatever is necessarily implied is traversable as much as if it were expressed. Judgment for plaintiff. (p) The court, however, observed that in this case the plaintiff was not *obliged* to traverse the sole seisin, and that the effect of merely traversing the *seisin modo et forma*, as alleged, would have been the same on the trial as that of traversing the *sole* seisin.

The doctrine of traverses being now discussed, the next subject for consideration is —

§ 131. Pleadings in confession and avoidance.—2. The nature and properties of pleadings in *confession and avoidance*.

First, with respect to their *division*. Of *pleas* in confession

(m) *Powers v. Cook*, 1 Lord Ray. 63; 1 Salk. 298, S. C.

(n) 1 Saund. 312 d, n. 4; *Gilbert v. Parker*, 2 Salk. 629; 6 Mod. 158, S. C.

(o) The action of *replevin* differs from other actions in the names of the pleadings. If the defendant pleads some matter confessing the taking, but showing lawful title or excuse, such pleading is not (as it would be in other actions) called a *plea in bar*, but an *avowry* or a *cognizance*; the former term applying to the case where the defendant sets up right or title in himself; the latter being used when he alleges the right or title to be in another person, by whose command he acted. Com. Dig., Pleader (8 K. 13, 14). The answer to the avowry or cognizance is called *plea in bar*; and then follows *replication*, *rejoinder*, etc., the ordinary name of each pleading being thus postponed by one step.

(p) *Gilbert v. Parker*, 2 Salk. 629; 6 Mod. 158, S. C.

¹ *Marie v. Garrison*, 88 N. Y. 14; *burgh Ry. Co. v. Hebblewhite*, 6 M. Spencer v. Otis, 96 Ill. 570; *Edin- & W.* 707.

and avoidance, some are distinguished (in reference to their subject-matter) as pleas in *justification or excuse*, others as pleas in *discharge*. (q) The pleas of the former class show some justification or excuse of the matter charged in the declaration; those of the latter, some discharge or release of that matter. The effect of the former, therefore, is to show that the plaintiff never had any right of action, because the act charged was lawful; the effect of the latter, to show that though he had once a right of action, it is discharged or released by some matter subsequent. Of those in justification or excuse the plea of *son assault demesne* (r) is an example; of those in discharge, a release. (s) This division applies to *pleas only*, for *replications and other subsequent pleadings* in confession and avoidance are not subject to any such classification.

As to the *form* of pleadings in confession and avoidance, it will be sufficient to refer the reader to the examples in the first chapter, (t) and to observe that, in common with all pleadings whatever which do not tender issue, they always *conclude with a verification and prayer of judgment*. (u)

With respect to the *quality* of these pleadings, it is a rule that every pleading by way of confession and avoidance must give color. (x)¹ This is a rule which it is very essential to understand in a view to a correct apprehension of the nature of these pleadings; yet it appears to have been not hitherto adequately explained or developed in the books of the science. *Color* is a term of the ancient rhetoricians, (y) and was adopted at an early period into the language of pleading. (z) As a term of pleading it signifies an apparent or *prima facie* right; and the meaning of the rule that every pleading in

(q) Com. Dig., Pleader (3 M. 12).

(r) See this plea, *supra*, p. 241.

(s) See this plea, *supra*, p. 147.

(t) *Supra*, pp. 147, 153.

(u) *Vide supra*, p. 239.

(x) See Reg. Plac. 304; Hatton v. Morse, 3 Salk. 273; Hallett v. Byrt, 5 Mod. 332; Holler v. Bush, 1 Salk. 394; 1 Chitty, 498.

(y) See Appendix, note (51).

(z) It occurs at least as early as the reign of Edward III. See Year Books, 38 Ed. III. 24; 40 Ed. III. 23.

¹ Conger v. Johnson, 2 Den. 96; Elten v. Hunt, 6 Hill, 311; Thayer v. Dibble v. Duncan, 2 McLean, 553; Brewer, 15 Pick. 217. Brown v. Artcher, 1 Hill, 266; Van

confession and avoidance must give color is that it must admit an apparent right in the opposite party, and rely, therefore, on some new matter by which that apparent right is defeated. (a) Thus, in the example formerly given of a plea of release to an action for breach of covenant, (b) the tendency of the plea is to admit an apparent right in the plaintiff, viz., that the defendant did, as alleged in the declaration, execute the deed and break the covenant therein contained, and would, therefore, *prima facie* be chargeable with damages on that ground; but shows new matter, not before disclosed, by which that apparent right is done away, viz., that the plaintiff executed to him a release. (c) Again, the plaintiff in his replication impliedly admits that the defendant has *prima facie* a good defense, viz., that such release was executed as alleged in the plea; and that the defendant, therefore, would be apparently discharged, but relies on new matter by which the effect of the plea is avoided, viz., that the release was obtained by duress. The plea in this case, therefore, *gives color* to the declaration, and the replication to the plea. But let it be supposed that the plaintiff had replied that the release was executed by him, but to another person and not to the defendant: this would be an informal replication as *wanting color*, because, if the release were not to the defendant, there would not exist even an apparent defense, requiring the allegation of new matter to avoid it; and the plea might be sufficiently answered by a *traverse*, denying that the deed stated in the plea is the deed of the plaintiff. (d) So, in the following example, the pleading is bad for *want of color*.

PLEA.

In trespass quare clausum fregit.

And for a farther plea in this behalf, as to the breaking the said close, in which, etc., and the treading down, trampling upon, consuming and spoiling the grass and herbage, as above supposed to have been done, the said C. D. and E. F., by leave

(a) See Appendix, note (23).

(b) *Supra*, p. 147.

(c) See another illustration, Reg. Plac. 304.

(d) See 1 Sid. 450, where a plea of this kind was held to be bad. The objection, indeed, in that case took a somewhat different shape, viz., that the plea amounted to the general issue. But this objection, as will be explained in a subsequent part of the work, is in substance the same with the *want of color*.

of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said A. B. ought not to have or maintain his aforesaid action thereof against them, because they say that before the said time when, etc., one C. D., the father of the said C. D., the now defendant, was seized in his demesne, as of fee, of and in the said close in which, etc. And being so seized, the said C. D., the father, before the said time when, etc., to wit, on the — day of —, in the year of our lord —, gave the said close, etc., to one G. D., son and heir apparent to the said C. D., the father, to have and to hold the same to himself, the said G. D., and the heirs of his body lawfully begotten; and for default of such issue, the remainder thereof to the said C. D., the now defendant, younger son of the said C. D., the father, and the heirs of the body of him, the said C. D., the now defendant, lawfully begotten; and for default of such issue, the remainder thereof to the right heirs of the said C. D., the father, forever. By virtue of which gift the said G. D. was seized of and in the said close in which, etc., in his demesne, as of fee tail; that is to say, to him and the heirs of his body lawfully begotten; the remainder thereof, for default of such issue, to the said C. D., the now defendant, and the heirs of his body lawfully begotten; the remainder thereof over, for default of such issue, to the right heirs of the said C. D., the father, forever; until one J. S., before the said time when, etc., entered into and upon the said close, in which, etc., upon the possession of the said G. D. thereof; and him, the said G. D., unjustly and without judgment disseised; whereby the said J. S. was seized of and in the said close, in which, etc., in his demesne, as of fee, by disseisin, etc. And he being so seized thereof by disseisin, the said G. D. made his continual claim to the said close, in which, etc., upon the possession of the said J. S. thereof, sometimes by entering thereon, and sometimes by approaching thereto as near as he, the said G. D., dared, so as to avoid bodily hurt, during the whole life of the said J. S., and within a day and year of the death of the said J. S. Which said J. S., being seized in form aforesaid of the said close in which, etc., before the said time when, etc., to wit, on the — day of —, in the year —, at — aforesaid, in the county aforesaid, died so seized of his said estate therein. After whose death, the said close in which, etc., descended to one T. S., as son and heir of the said J. S. Wherefore the said T. S., before the said time when, etc., entered into the said close in which, etc., and was seized thereof in his demesne as of fee; upon whose possession whereof, the said G. D. re-entered in and upon the said close in which, etc., and was seized thereof in his demesne as of fee tail, by form of the gift aforesaid, as in his former estate. And being so seized thereof, the said G. D. afterwards, and before the said

time when, etc., to wit, on the — day of —, in the year —, at — aforesaid, in the county aforesaid, died so seised of his said estate thereof, without heir of his body lawfully begotten. After whose death, and before the said time when, etc., the said C. D., the now defendant, entered into and upon the said close in which, etc., as into his said remainder, and was thereof seised in his demesne as of fee tail, according to the form of the gift aforesaid. And being so seised thereof, the said C. D., the now defendant, before the said time when, etc., to wit, on the — day of —, in the year —, at — aforesaid, in the county aforesaid, demised the said close in which, etc., to E. F., the other of the said defendants, to have and to hold the same to him and his assigns, from the feast of the annunciation of the blessed Virgin Mary then last past, until the end and term of twenty-one years thence next following, and fully to be complete and ended. By virtue of which demise, the said E. F., before the said time when, etc., entered into the said close in which, etc., and was thereof possessed.* Wherefore the said E. F., in his own right, and the said C. D., the now defendant, as the servant of the said E. F., and by his command, afterwards, to wit, at the said time when, etc., broke and entered the said close in which, etc., and trod down, trampled upon, consumed and spoiled the grass and herbage there growing and being, as it was lawful for them to do for the cause aforesaid; which are the same trespasses in the introductory part of this plea mentioned, and whereof the said A. B. hath above complained. And this the said defendants are ready to verify. Wherefore they pray judgment if the said A. B. ought to have or maintain his aforesaid action thereof against them, etc.

*

This plea (as already observed) is informal, as *wanting color*. (e) The declaration charges the defendants with breaking and entering the *plaintiff's close*; to which the answer (in substance) is, that at the time of the alleged trespass one of the defendants was seised in tail of the said close, and the other defendant in possession of it, as his lessee for years. But if this be so, it follows that the plaintiff has not even a colorable right to maintain the action as for trespass *to his close*; for he had not even the possession; and if he had, a mere possession without some show of title is insufficient in law to give such colorable right against the true owner. In such case the usual and regular course would be not to plead in confession and avoidance, but to adopt the general issue, *not guilty*, which (as we have seen) (f) puts the plaintiff's

(e) See Cro. Jac. 229.

(f) Vide *supra*, p. 235.

lawful possession of the close in issue as well as the mere fact of the trespass.

The kind of color to which these observations relate, being a latent quality naturally inherent in the structure of all regular pleadings in confession and avoidance, has been called *implied* color,¹ to distinguish it from another kind, which is in some instances formally inserted in the pleading, and is therefore known by the name of *express* color. (g) It is the latter kind to which the technical term most usually applies; and to this the books refer when color is mentioned *per se*,—without the distinction between express and implied. Color in this sense is defined to be “a feigned matter, pleaded by the defendant in an action of trespass, from which the plaintiff seems to have a good cause of action, whereas he has, in truth, only an appearance or color of cause.” (h) This is one of the most curious subtleties that belong to the science of pleading; and though now rather of rare occurrence, yet, as it is still sometimes practiced, and is, besides, illustrative of the important doctrine of *implied* color, deserves attention. Its nature and use may be thus explained. The necessity of an implied color has evidently the effect of obliging the pleader to *traverse*, in many instances in which his case, when fully stated, does not turn on a mere denial of fact, but involves some consideration of law. In the example first above given of want of color, (i) this would not be so; for if the deed of release were executed not to the defendant but to a different person, this of course amounts to no more than a mere denial that the deed as alleged in the plea is the deed of the plaintiff; and no question of *law* can be said to arise under this traverse. But in the second example, (k) let it be supposed that the plaintiff was in wrongful possession of the close without any farther appearance of title than the possession itself, at the time of the trespass alleged, and that the defendants entered upon him in assertion of their title; but, being unable to set

(g) *Hatton v. Morse*, 3 Salk. 373; *Reg. Plac.* 304; *Holt's Inst.* 563.

(h) *Enc. Ab.*, Trespass, I., 4.

(i) *Supra*, p. 267.

(k) *Supra*, p. 267.

¹ The plea of *liberum tenementum*. *Ft. Dearborn Lodge v. Klein*, 115 Ill. is an example of giving implied color. See for citation of authorities,

forth this title in the pleading in consequence of the objection that would arise from want of color (the plaintiff's mere wrongful possession being insufficient to prevent that objection), are driven to plead the general issue, not guilty. By this plea an issue is produced whether the defendants are guilty or not of the trespasses; but upon the trial of the issue it will be found that the question turns entirely upon construction of law. The defendants say they are not guilty of the trespasses, because they are not guilty of breaking the *close of the plaintiff* as alleged in the declaration; and that they are not guilty of breaking the close of the plaintiff, because they had themselves the property in that close; and their title is this: that the father of one of the defendants, being seised of the close in fee, gave it in tail to his eldest son, remainder in tail to one of the defendants; that the eldest son was disseised, but made *continual claim* until the death of the disseisor; after whose death, the descent being cast upon his heir, the disseisee entered upon the heir, and afterwards died; when the remainder took effect in the said defendant, who demised to the other defendant. Now, this title involves a legal question, viz.: whether *continual claim* will not preserve the right of entry in the disseisee, notwithstanding a descent cast on the heir of the disseisor. (1) The issue, however, is merely *not guilty*, and this is triable by jury; and the effect, therefore, would be, that a jury would have to decide this question of law, subject to the direction upon it which they would receive from the judge at *nisi prius*. But, let it be supposed that the defendants, in a view to the more satisfactory decision of this question, wish to bring it under the consideration of the court in bank, rather than have it referred to a jury: If they have any means of setting forth their title specially in their plea, the object will be attained; for then the plaintiff, if disposed to question the sufficiency of the title, may demur to the plea, and thus refer the legal question to the decision of the judges. But such plea (as we have seen), if pleaded simply according to the state of fact, would be informal for want of color; and hence arises a difficulty. The pleaders of former days contrived to overcome this difficulty in the following singular manner. In such a case as that supposed, the plea wanting

(1) As to the law on this point, see Co. Litt. 250, 1; 2 Bl. Com. 316; 3 Id. 175.

* *implied* color, they gave, in lieu of it, an *express* one, by inserting a fictitious allegation of some colorable, but insufficient, title in the plaintiff; which they at the same time *avoided* by the preferable title of the defendants. Thus they would set forth the title as in the example, p. 267, down to the mark *, and would then proceed to insert the following fictitious averment: "And the said A. B., claiming the said close, etc., by color of a certain charter of demise to him thereof made for the term of his life by the said C. D., the father, long before the said gift by the said C. D., the father, to the said G. D., in form aforesaid, made (whereas nothing of or in the said close in which, etc., ever passed into the possession of the said A. B. by virtue of that charter) before the said time when, etc., entered into and upon the said close in which, etc. And thereupon the said E. F., in his own right, and the said C. D., the now defendant, as the servant of the said E. F., and by his command, afterwards, to wit, at the said time when, etc., entered into and upon the said close in which, etc., in and upon the said A. B.'s possession thereof, and trod down, trampled upon, consumed and spoiled, etc." (to the end of the plea). (m) This was called *giving color*; and it was held to cure, or prevent, the objection which would otherwise arise from the want of implied color; and the plea, with this insertion, was considered as sufficiently formal. For, when pleaded in that form, it confesses some apparent title in the plaintiff, viz., a charter of demise for the term of his life, by virtue of which he entered and was possessed. The plea admits, therefore, that the close was, in some sense, the *close of the plaintiff*, but at the same time it *avoids* this colorable title by showing that of the defendants, and alleging that the plaintiff's title, under the charter of demise, was defective in point of law, and that nothing passed under that charter. (n)

It is to be understood that when color was thus given, the plaintiff was not allowed in his replication to traverse the

(m) This plea, with the color here given, is copied from Brown's Entries, p. 343. Another example will be found, *supra*, p. 241. See, also, 2 Edw. IV. 8, for an example of color, and an illustrative case upon the subject.

(n) The defect in the title given by this color is, that the charter, though a charter of demise for life, is not pleaded as a *feoffment*, and does not appear to have been accompanied by *livery of seisin*. See Doct. Pldg. 73; Leyfield's Case, 10 Rep. 89 b.

fictitious matter suggested by way of color, (o) for, its only object being to prevent a difficulty of *form*, such traverse would be wholly foreign to the merits of the cause and would only serve to frustrate the fiction which the law, in such case, allows. The plaintiff would therefore pass over the color without notice, and would either traverse the title of the defendants if he meant to contest its truth in point of fact, or demur to it if he meant to except to its sufficiency in point of law; and thus the defendants would obtain their object of bringing any legal question raised upon their title under consideration of the court and withdrawing it from the jury.

Such is still the course of proceeding and the state of the law on this subject in the few cases in which express color is now given; and the particular example above adduced is one that might occur in the practice of the present day. (p)

The practice of giving express color obtained in the mixed actions called an *assise*, and the *writ of entry in nature of an assise*, and the personal action of *trespass*. (q) The two former kinds of proceeding being now obsolete, it occurs at present in the action of trespass only; nor is it even in trespass often found to be expedient. As to these *actions*, so the practice of giving express color seems to be confined to *pleas*, and not to extend to replications or other subsequent pleadings. (r) It is also to be understood with respect to giving express color, that though, originally, *various* suggestions of apparent right might be adopted, according to the fancy of the pleader, (s) and though the same latitude is, perhaps, still allowable, yet in practice it is unusual to resort to any except certain known fictions, which long usage has applied to the particular case. Thus, in trespass to land, the color universally given is that of a defective *charter of demise*, as in the above example.¹

There are some rules, with respect to express color, immediately resulting from the nature of the fiction and the object

(o) 1 Chitty, 501.

(p) See Appendix, note (53).

(q) 3 Reeves, 438; Doct. and Stud., p. 271.

(r) 1 Chitty, 601; and see *Taylor v. Eastwood*, 1 East, 212; 3 Reeves, 441.

(s) 3 Reeves, 441.

¹The idea of giving color necessarily pervades every system of pleading which recognizes the idea of pleading in confession and avoidance. It obtains, therefore, in the code states. See *Thayer v. Brown*, 15 Pick. 217; *Morgan v. Hawkeye Ins. Co.*, 87 Ia. 359.

for which it is adopted. Thus it is laid down *that it must consist of such matter as, if it were effectual, would maintain the nature of the action.* (t) For example: in an action of assise, where the demandant complains of a disseisin of his *freehold*, the tenant should not, by way of giving color, suggest a demise to the demandant for *years*, because this would not give him even a colorable ground to maintain an assise. (u) On the other hand, it is to be observed that the right suggested must be *colorable* only; and that it must not amount to a *real* or *actual* right. For if it does, then the plaintiff would, of course, upon the defendant's own showing, be entitled to recover; and the plea would be an insufficient answer. For example: in trespass for taking away one hundred loads of wood, if the defendant pleads that I. S. was possessed of them *ut de bonis propriis*, and the plaintiff, claiming them *by color of a deed of gift, by the said I. S. afterwards made*, took them, and then the defendant re-took them, the plea is bad; for, if the plaintiff took possession of the goods under a deed of gift from the lawful owner, he has a good title to them, and ought to recover. (x) So, in the example of color before given, it would be bad pleading if, instead of alleging that the plaintiff claimed by color of a certain *charter of demise* for the term of his life, etc., it were alleged that he claimed by color of a certain *feoffment* for the term of his life; for, in the word *feoffment*, the law intends not only the charter of demise, but the livery of seisin also; and the title allowed to the plaintiff would therefore not be defective or colorable, but valid. (y) There are other rules relative to express color; but as they seem, on examination, to be either resolvable into the same principles that have been already considered, or, where this is not the case, to be obscure and unimportant, they need not be here discussed.

The pleadings by way of *traverse* and those by way of *confession and avoidance* having been now separately considered, there are yet to be noticed —

§ 132. 3. The nature and properties of pleadings in general, without reference to their quality, as being by way of *traverse* or *confession and avoidance*.

(t) Bac. Ab., Pleas, etc. (I.), 8; Com. Dig., Pleader (3 M. 41).

(u) Kellw. 108.

(x) Radford v. Harbyn, Cro. Jac. 122.

(y) Doct. Pl. 73.

First, it is a rule *that every pleading must be an answer to the whole of what is adversely alleged.* (2)¹ *learn*

Therefore, in an action of trespass for breaking a close and cutting down three hundred trees, if the defendant pleads, as to cutting down all but two hundred trees, some matter of justification or title, and as to the two hundred trees says nothing, the plaintiff is entitled to sign judgment as by *nil dicit* against him in respect of the two hundred trees, and to demur or reply to the plea as to the remainder of the trespasses. On the other hand, if he demurs or replies to the plea without signing judgment for the part not answered, the whole action is said to be *discontinued*. (a) For the plea, if taken by the plaintiff as an answer to the whole action, it being in fact a partial answer only, is in contemplation of law a mere nullity; and there is consequently an interruption or chasm in the pleading, which is called in technical phrase a *discontinuance*. And such discontinuance will amount to error on the record. (b) It is to be observed, however, that as to the plaintiff's course of proceeding there is a distinction between a case like this, where the defendant does not profess to answer the whole, and a case where, by the commencement of his plea, he professes to do so, but in fact gives a defective and partial answer applying to part only. The latter case amounts merely to insufficient pleading, and the plaintiff's course, therefore, is not to sign judgment for the part defectively answered, but to *demur* to the whole plea. (c) It is also to be observed that where the part of the pleading to which no answer is given is immaterial, or such as requires no separate or specific an-

(s) Com. Dig., Pleader (E. 1), (F. 4); 1 Saund. 28, n. 3; *Herlakendeu's case*, 4 Rep. 62 a.

(a) Com. Dig., Pleader (E. 1), (F. 4); 1 Saund. 28, n. 3; *Herlakendeu's case*, 4 Rep. 62 a.

(b) Cro. Jac. 353. Such error is cured, however, after verdict, by the statute of Jeoffails, 38 H. 8, ch. 30; and after judgment by *nil dicit*, confession, or *non sum informatus*, by 4 Ann., ch. 16.

(c) 1 Saund. 28, n. 3.

¹ *Goodrich v. Reynolds*, 81 Ill. 490, 88 Am. Dec. 240; *Dickerson v. Hendryx*, 88 Ill. 68; *Wittick v. Traun*, 27 Ala. 562, 62 Am. Dec. 778; *Bowlus v. Phoenix Ins. Co.*, 123 Ind. 106, 20 L. R. A. 400. This may be done by answering each fact or sing-

ling out some one or more material facts. *Hopkins v. Medley*, 97 Ill. 402. A single paragraph of an answer cannot be both a denial and a valid plea in confession. *Bowlus v. Phoenix Ins. Co.*, 123 Ind. 106, 20 L. R. A. 400.

swer,—for example, if it be mere matter of *aggravation*,—the rule does not, in that case, apply. (d)¹

Again, it is a rule *that every pleading is taken to confess such traversable matters alleged on the other side as it does not traverse*. (e)² Thus, in the example given in the first chapter (f) of an action on an indenture of covenant, the plea of release, as it does not traverse the indenture, is taken to admit its execution; and the replication of duress, on the same principle, is an admission of the execution of the release. So the plea traversing the want of repair (g) is an admission of the indenture of demise. The effect of such admission is extremely strong; for, first, it concludes the party, even though the jury should improperly go out of the issue, and find the contrary of what is thus confessed on the record; (h) and, in the next place, it is to be remarked that the confession operates not only to prevent the fact from being afterwards brought into question in the same suit,³ but is equally con-

(d) 1 Saund. 28, n. 2.

(e) Com. Dig., Pleader (G. 2); Bac. Ab., Pleas, etc., pp. 322, 386 (5th ed.); Str. 297; Hudson v. Jones, 1 Salk. 91; Nicholson v. Simpson, 11 Mod. 336; Fort. 356, S. C.

(f) *Supra*, pp. 147, 153.

(g) *Supra*, p. 146.

(h) Bac. Ab., Pleas, etc., p. 322 (5th ed.); 2 Mod. 5.

¹The New York courts early departed from the English rule. There it was laid down that: 1. Every plea in bar must not only contain a good answer so far as it professes to go, but it must answer the whole declaration or grant to which it is pleaded. 2. If the whole be not answered the plaintiff may demur, and the action will not be thereby discontinued, but the plaintiff will be entitled to judgment. *Sterling v. Sherwood*, 20 Johns. 204; *Riggs v. Denniston*, 3 Johns. Cas. 198; *Hickok v. Coates*, 2 Wend. 419, 20 Am. Dec. 632; *Loder v. Phelps*, 13 Wend. 46; *Underwood v. Campbell*, 13 id. 78; *Etheridge v. Osborn*, 12 id. 399; *Root v. Woodruff*, 6 Hill, 418; *Kneedler v. Sternberg*, 10 How. Pr. 67. In New Jersey, on the other hand, it has been held — citing the text — that if the plea answer all it professes to answer, and that is a material and severable part of the count, then the plaintiff must reply or demur to the plea, and as to the part of his count not answered he must enter judgment as by *nil dicit*. *Flemming v. Hoboken*, 40 N. J. L. 270. And see *Clarkson v. Lawson*, 6 Bing. 587.

²*Briggs v. Dorr*, 19 John. 95; *Simmons v. Jenkins*, 76 Ill. 479. This point marks a difference between the rules of equity and law pleading. Nothing is admitted in chancery except what is expressly admitted. *Hopkins v. Medley*, 97 Ill. 402. The pleading may be read to the jury, and the jury can find no fact against it. *Lettick v. Honnold*, 63 Ill. 335; *Gould's Pl.* (3d ed.), p. 152, § 168.

³Whether it may operate in the same suit upon other issues is decided

clusive as to the truth of that fact, in any *subsequent action* between the same parties.¹ The rule, however (it will be observed), extends only to such matters as are *traversable*. For matters of *law*, (i) or any other matters which are not fit subjects of traverse, are not taken to be admitted by pleading over. (k)²

It is this rule which has given rise to the practice of *protestation* in pleading. (l) When the pleader passes over, without traverse, any traversable fact alleged, and at the same time wishes to preserve the power of denying it in *another action*, he makes, collaterally or incidentally to his main pleading, a declaration importing that this fact is untrue; and this is called a *protestation*; and it has the effect of enabling the party to dispute, in another action, the fact so passed over. (m) Its form is as follows:³

PLEA.

In assumpsit for goods sold and delivered.

And the said C. D., by — —, his attorney, comes and defends the wrong and injury, when, etc., and says that the said A. B. ought not to have or maintain his aforesaid action against him, the said C. D., because he says that after the making of the said promises and undertakings, and before the commencement of this suit, to wit, on the — day of —,

(i) *Vide supra*, p. 262.

(k) 10 Ed. 4, 12. See Appendix, note (54).

(l) Bac. Ab., Pleas, etc., p. 386, note (a), 5th ed.

(m) Com. Dig., Pleader (N.); Co. Litt. 124 b; 2 Saund. 103 a, n. 1.

differently. That it may, see Howard v. Glenn, 85 Ga. 238, 21 Am. St. R. 156. *Contra*, Glenn v. Sumner, 133 U. S. 156; Edmunds v. Groves, 2 M. & W. 642; Knight v. McDonald, 12 Ad. & El. 438.

¹ The statement of the text is open to misconstruction, and may mislead. When the fact admitted is material and is followed by judgment, it necessarily binds and becomes involved in an adjudication. This is conclusive and admissible to prove what was litigated; but not all facts stated in pleading which are filed by attorneys are admissible as evidence in

other suits. In addition to the authorities cited in the last note, see Boileau v. Rutlin, 2 Ex. 665; 1 Greenl. Ev. (15th ed.), §§ 169-172, and notes; Johnson v. Russell, 144 Mass. 409; Dennie v. Williams, 135 id. 28; Baldwin v. Gregg, 18 Met. 253; Pope v. Allis, 115 U. S. 363.

² *Cf.* Dundee Mortg. Co. v. Nixon, 95 Ala. 318.

³ Dills v. Stobie, 81 Ill. 202; 1 Chit. Pl. (7th Am. ed.) 649. See Anderson's L. Dict., tit. Protestation; Bouvier's L. Dict., id.; 3 Cooley's Black. (3d ed.) 311.

in the year —, at — aforesaid, in the county aforesaid, he, the said C. D., gave and delivered to the said A. B. a certain pipe of wine, in full satisfaction and discharge of the said promises and undertakings, and of all the sums of money in the said declaration mentioned; which said pipe of wine, so given in full satisfaction and discharge as aforesaid, the said A. B. then and there accepted in full satisfaction and discharge of the said promises and undertakings, and of all the sums of money in the said declaration mentioned. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action against him.

REPLICATION.

And the said A. B. says that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against the said C. D., because, *protesting that the said C. D. did not give or deliver to him, the said A. B., the said pipe of wine, as the said C. D. hath above in pleading alleged*, for replication, nevertheless, in this behalf, the said A. B. says that he, the said A. B., did not accept the said pipe of wine in full satisfaction and discharge of the said promises and undertakings, and of all the sums of money in the said declaration mentioned, in manner and form as the said C. D. hath above alleged. And this the said A. B. prays may be inquired of by the country. (n)

In the case supposed by the above example the *delivery* of the pipe of wine and its *acceptance* are two different allegations; and in traversing the latter, it may be thought advisable not to admit the former, because the delivery, if it were not accepted in satisfaction, might possibly become the subject of dispute in some other action between the same parties. In order, therefore, not to be concluded by the implied admission of its delivery, which would otherwise arise by passing it over without traverse, the pleader takes the *delivery* by protestation, while he traverses the *acceptance*.

Such being the only object and effect of the protestation, it will be understood that it is wholly without avail *in the action in which it occurs*; and that, under the rule already laid down, every traversable fact not traversed is, notwithstanding the protestation, to be taken as admitted *in the existing suit*.

It is also given as a rule, that if upon the traverse the issue

(n) 2 Went. 135; 2 Chitty, 602.

is found *against* the party protesting, the protestation does not avail; and that it is of no use except in the event of the issue being determined *in his favor*; with this exception, however, that if the matter taken by protestation be such as the pleader could not have taken issue upon, the protestation in that case shall avail, even though the issue taken were decided against him. (o)

A protestation ought not to be *repugnant to the pleading which it accompanies*; (p) nor ought it to be *taken on such matter as the pleading itself traverses*. (q) The rules, however, with respect to the *form* of a protestation become the less material, because it has been decided that neither a superfluous nor repugnant protestation is sufficient ground for *demurrer*; (r) the protestation itself having in view *another suit* only, and its faults of form being therefore immaterial in the present action.

It has been already observed that the necessity of the protestation arises from the rule "that every traversable fact not traversed is confessed." But it has been seen that an answer in fact is no admission of the sufficiency in point of *law* of the matter answered. (s) It follows, therefore, that it is not necessary, in passing over an insufficient pleading without demurrer and answering in point of fact, to make any protestation of the insufficiency in law of such pleading; for, even without the protestation, no implied admission of its sufficiency arises. In practice, however, it is not unusual in such case to make a protestation of *insufficiency in law*; the form having apparently been adopted by analogy to the proper kind of protestation, viz., that against the truth of a *fact*.

§ 133. Exceptions to the rule under consideration.—Such are the doctrines involved in the general rule *that the party must either demur or plead by way of traverse or by way of confession and avoidance*. It remains, however, to notice certain *exceptions* to which that branch of the rule is subject, which relates to *pleading*, and which requires a party to plead either by way of *traverse* or by way of *confession and avoidance*.

(o) 2 Saund. 108 a, n. 1; q. v., for farther explanation on this subject.

(p) Com. Dig., Pleader (N.); 2 Saund., *ubi supra*.

(q) Com. Dig., Pleader (N.).

(r) Com. Dig. and Saund., *ubi supra*.

(s) *Vide supra*, p. 222.

First, there is an exception in the case of *dilatory pleas*. A plea of this kind opposes a matter of form to the declaration, but (as will appear on examination of the examples in the first chapter) does not tend either to deny or to confess its allegations. In all other divisions of pleading, however, including not only pleas in *bar*, but all *replications* and *subsequent pleadings*, whether following on pleas in bar or on dilatory pleas, the rule in question obtains.¹

There is another exception in the case of *pleadings in estoppel*.²

A man is sometimes precluded in law from alleging or denying a fact in consequence of his own previous act, allegation or denial of a contrary tenor; and this preclusion is called an *estoppel*. (t) An estoppel may arise either from matter of *record*,—from the *deed* of the party,—or from matter *in pais*; that is, matter of *fact*. Thus, any confession or admission made in pleading in a court of record, whether it be express, or implied from pleading over without a traverse, will forever preclude the party from afterwards contesting the same fact in any subsequent suit with his adversary. (u) This is an estoppel by matter of *record*. As an instance of an estoppel by *deed* may be mentioned the case of a bond reciting a certain fact. The party executing the bond will be precluded from afterwards denying, in any action brought upon that instrument, the fact so recited. (x) An example of an estoppel by matter *in pais* occurs when one man has accepted rent of another. He will be estopped from afterwards denying, in any action with that person, that he was at the time of such acceptance his tenant. (y).

This doctrine of law gives rise to a kind of pleading that is neither by way of traverse nor confession and avoidance, viz.: a pleading that, waiving any question on the fact, relies merely on the estoppel; and, after stating the previous act, allegation or denial of the opposite party, prays judgment if he *shall be*

(t) "An estoppel is when a man is concluded by his own act or acceptance to say the truth." Co. Litt. 352 a.

(u) Com. Dig., Estoppel (A. 1).

(x) 5 Barn. & Ald. 692.

(y) Com. Dig., Estoppel (A. 3); Co. Litt. 352 a.

¹ Dana v. Bryant, 1 Gilm. 104.

² Id. See Cromwell v. Sac Co., 94 U. S. 351.

received or admitted to aver contrary to what he before did or said. This is called a pleading *by way of estoppel*, and its form is as follows:

PLEA

Of Misnomer.

In abatement of the bill.

And C. D., against whom the said A. B. hath exhibited his bill by the name of E. D., in his own person comes, and says that he was baptized by the name of C., to wit, at — aforesaid; and by the Christian name of C. hath always, since his baptism hitherto, been called and known. (2) Without this, that the said C. D. now is, or at the time of exhibiting the said bill was, or ever before had been, called or known by the Christian name of E., as by the said bill is supposed. And this the said C. D. is ready to verify. Wherefore he prays judgment of the said bill and that the same may be quashed.

REPLICATION.

And the said A. B. saith that the said person against whom he hath exhibited his said bill by the name of E. D. *ought not to be admitted or received* to plead the plea by him above pleaded for quashing the bill of him, the said A. B., because he saith that the said person against whom he, the said A. B., hath exhibited his said bill by the name of E. D., heretofore, to wit, in the term of — last past, came into this court here, and put in bail, at the suit of the said A. B., in the plea aforesaid, by the name of E. D.; as by the record thereof remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears. And this he, the said A. B., is ready to verify by that record. Wherefore he prays judgment if the said person against whom he hath exhibited his said bill by the name of E. D. *ought to be admitted or received to his said plea* for quashing the said bill, contrary to his own acknowledgment and the said record, and that he may answer over to the said bill. (a)¹

✓ § 134. New assignment.— Another exception to that branch of the general rule which requires the pleader either to trav-

(2) It is a rule with respect to pleas in abatement (to be hereafter explained in its proper place) that they must give the plaintiff a better writ or bill; that is, afford him the means of correcting the mistake of form to which the plea refers. Accordingly this plea of misnomer, in denying that the defendant is called by the name of E., states his true name, C.; and the insertion of this matter, by way of introduction to the denial, occasions the necessity of using a *special traverse*. Here, therefore, is another case, in addition to those formerly noticed, in which it becomes proper to resort to that formula. *Vide supra*, p. 251.

(a) 2 Chitty, 416, 590.

¹ See further, *Plummer v. Woodburn*, 4 Barn. & Crea. 625.

er, or confess and avoid, arises in the case of what is called a *new assignment*.¹

It has been seen that the declarations are conceived in very general terms, a quality which they derive from their adherence to the tenor of those simple and abstract formulæ — the original writs. The effect of this is, that in some cases the defendant is not sufficiently guided by the declaration to the real cause of complaint, and is therefore led to apply his answer to a different matter from that which the plaintiff has in view. For example, it may happen that the plaintiff has been *twice assaulted* by the defendant, and one of these assaults may have been justifiable, being committed in self-defense, while the other may have been committed without legal excuse. Supposing the plaintiff to bring his action for the *latter*, it will be found by referring to the example formerly given, (b) of declaration for assault and battery, that the statement is so general as not to indicate to which of the two assaults the plaintiff means to refer. (c) The defendant may therefore suppose, or affect to suppose, that the *first* is the assault intended, and will plead *son assault demesne*, as in the example *supra*, p. 241. This plea the plaintiff cannot safely *traverse*, because, as an assault was in fact committed by the defendant, under the circumstances of excuse here alleged, the defendant would have a right, under the issue joined upon such traverse, to prove those circumstances, and to presume that such assault, and no other, is the cause of action. And it is evidently *reasonable* that he should have this right, for, if the plaintiff were, at the trial of the issue, to be allowed to set up a different assault, the defendant might suffer by a mistake into which he had been led by the generality of the plaintiff's declaration. The plaintiff, therefore, in the case supposed, not being able safely to traverse, and having no ground either for demurrer, or for pleading in confession and avoidance, has no course but by a new pleading to correct the mistake occasioned by the generality of the declaration, and to declare

(b) *Supra*, p. 117.

(c) As for the *day and place*, alleged in the declaration, it will be shown hereafter that they are not considered as material to be proved in such a case, and are consequently alleged without much regard to the true state of fact.

¹ *Dana v. Bryant*, 1 Gilm. 104.

that he brought his action, not for the *first*, but for the *second* assault; and this is called a *new assignment*. Its form, in the example here chosen, would be as follows:

REPLICATION

To the Plea of Son Assault Demesne, in page 241.

By way of new assignment.

And as to the said plea of the said C. D., by him secondly above pleaded, as to the said several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, the said A. B. says that by reason of anything in that plea alleged he ought not to be barred from having and maintaining his aforesaid action thereof against the said C. D., because he says that he brought his said action, not for the trespass in the said second plea acknowledged to have been done, but for that the said C. D. heretofore, to wit, on the — day of —, in the year of our Lord —, with force and arms, at — aforesaid, in the county aforesaid, upon another and different occasion, and for another and different purpose than in the said second plea mentioned, made another and different assault upon the said A. B. than the assault in the said second plea mentioned, and then and there beat, wounded and ill-treated him in manner and form as the said A. B. hath above thereof complained; which said trespasses above newly assigned are other and different trespasses than the said trespasses in the said second plea acknowledged to have been done. And this the said A. B. is ready to verify. Wherefore, inasmuch as the said C. D. hath not answered the said trespass above newly assigned, he, the said A. B., prays judgment, and his damages by him sustained by reason of the committing thereof, to be adjudged to him, etc. (*d*)

The mistake being thus set right by the new assignment, it remains for the defendant to plead such matter as he may have, in answer to the assault last mentioned; the first being now out of question.

As the object of a new assignment is to correct a mistake occasioned by the generality of the *declaration*, it always occurs in answer to a *plea*; and is therefore in the nature of a *replication*. It is not used in any other part of the pleading, because the statements subsequent to the declaration are not in their nature such, when properly framed, as to give rise to the kind of mistake which requires to be corrected by a new assignment.

(*d*) 9 Went. 322; 2 Chitty, 653.

A new assignment chiefly occurs in an action of *trespass*; but it is sometimes used also in *trespass on the case*; and seems to be generally allowed in all actions in which the form of declaration makes the reason of the practice equally applicable. (e)¹

Several new assignments may occur in the course of the same series of pleading. Thus, in the above example, if it be supposed that *three* different assaults had been committed, two of which were justifiable, the defendant might plead, as above, to the declaration, and then, by way of plea to the new assignment, he might again justify, in the same manner, another assault, upon which it would become necessary for the plaintiff to new-assign a third, and this upon the same principle by which the first new assignment was required. (f)²

(e) 1 Chitty, 608; Vin. Ab., Novel Assignment, 4, 5. Vide 1 Bos. & Pul. 413.

(f) 1 Chitty, 614; 1 Saund. 299 c.

¹ See *Batt v. Bradley*, Cro. Jac. 121.

² Ordinarily a new assignment is necessary or proper only where there are two acts alleged; so Chitty says the very act of new assigning supposes two acts. 1 Chitty, Pl. *628, note r. And when the declaration counts upon a single act, the plaintiff cannot traverse and new assign to a plea of justification. *Thomas v. Marsh*, 5 C. & P. 596; *Cheasley v. Barnes*, 10 East, 78-81; 1 Arch. N. P. *528. A plaintiff is not obliged to new assign where the matter which renders the defendant liable is part of the acts declared upon; *e. g.*, when a battery is excessive, in such cases the replication *de injuria* is the proper one. *Ayres v. Kelley*, 11 Ill. 17; *Hannen v. Edes*, 15 Mass. 347; *Franks v. Morris*, 10 East, 81. Indeed, under the rule that a new assignment is an abandonment of the acts justified, such a proceeding would be fatal. The acts new assigned should be of separate acts, such as remaining in possession too long, or acts of abuse of process, or acts not covered by the license.

Ayres v. Kelley, 11 Ill. 17; *Dye v. Letherdale*, 8 Wils. 20; *Greene v. Jones*, 1 Saund. 299, notes.

But when there is but one act of trespass and one count in the declaration, and the defendant justifies the apparent wrong, and the plaintiff really relies upon an abuse of the license of law, he should new assign the matter which makes the defendant a trespasser *ab initio*. *Lucas v. Nockells*, 2 Y. & J. 304, 220; *Hannes v. Edes*, 15 Mass. 347; *Taylor v. Cole*, 3 Tenn. 292; *McConnell v. Kibbe*, 33 Ill. 175; *Hubbell v. Wheeler*, 2 Aik. (Yt.) 359. Cf. *Bennett v. McIntyre*, 121 Ind. 231. For a form for such a replication, see Archbold, N. P. (3d Am. ed.), p. 485.

In case the defendant pleads a license of law, the new assignment may be of matter which makes him a trespasser *ab initio*, and the recovery on the new assignment, notwithstanding it is an abandonment of the matter justified, may be for the whole damage; but if the license be merely a license given by the person, the recovery can only be for the acts

A new assignment is said to be *in the nature of a new declaration*. (g) It seems, however, to be more properly considered as a repetition of the declaration; (h) differing only in this, that it distinguishes the true ground of complaint as being different from that which is covered by the plea. Being in the nature of a new or repeated declaration, it is consequently to be framed with as much *certainly* or specification of circumstance as the declaration itself. (i) In some cases, indeed, it should be even *more* particular, so as to avoid the necessity of *another* new assignment. Thus, if the plaintiff declare in trespass for breaking his close in a certain parish, without naming or farther describing the close (a course which the forms of declaration in trespass allow), if the defendant happen to have *any* freehold in the same parish, he may plead that the close in question was his own freehold; and then, upon the principle already explained, it will be necessary for the plaintiff to new-assign, alleging that he brought his action in respect of a different close from that claimed by the defendant as his freehold. And in this case he must, in his new assignment, either give his close its name or otherwise sufficiently describe it, (k) though such name or description was not required in the declaration.

The rule under consideration and its exceptions being now discussed, the last point of remark relates to an inference or deduction to which it gives rise.

It is implied in this rule that as the proceeding must either

(g) Bac. Ab., Trespass (I), 4, 2; 1 Saund. 299 a.

(h) *Vide* 1 Chitt. 602.

(i) Bac. Ab., *ubi supra*; 1 Chitty, 610.

(k) Com. Dig., Pleader (3 M. 34). See an example, 9 Went. 187.

new assigned. *Hubbell v. Wheeler*, 2 Aik. (Vt.) 359. *Cf.* *Bennett v. McIntyre*, 121 Ind. 231; *Six Carpenters' Case*, 8 Coke, 146; 1 Sm. Ld. Cas. (9th ed.) 261.

If there are two counts and the defendant alleges that they are for one and the same supposed trespass, etc., the plaintiff may traverse this allegation. 1 Chitty, Pl. *414. The allegation that the trespass new assigned is another than that pleaded

to is traversable. Gould, Pl., p. 367: 1 Saund. 299, n. If the plaintiff alleges trespass on divers days, etc., the defendant may narrow it by alleging in his plea that "these are the same supposed trespasses." See 1 Arch. N. P. 593; 1 Saund. 298, n. 2.

The principle governing the rules as to new assignments are applicable to the code. See two good examples: *Campbell v. Bannister*, 79 Ky. 205; *Bennett v. McIntyre*, 121 Ind. 231.

be by demurrer, traverse, or confession and avoidance, so *any* of these forms of opposition to the last pleading is in itself *sufficient*.

There is, however, an exception to this in a case which the books consider as anomalous and solitary. It is as follows: If, in debt on a bond conditioned for the performance of an award, the defendant pleads that no award was made, and the plaintiff, in reply, alleges that an award was made, setting it forth, it is held that he must also proceed to state a *breach* of the award; and that, without stating such breach, the replication is insufficient. (2) This, as has been observed, is an anomaly; for as, by alleging and setting forth the award, he fully *traverses* the plea which denied the existence of an award, the replication would seem, according to the general rule under consideration, to be sufficient without the specification of any breach.¹

RULE II.

§ 135. Upon a traverse issue must be tendered.¹ —

In the account given in another place (*m*) of traverses, it was shown that, with the exception of a *special* traverse, the different forms all involve a *tender of issue*. The rule under consideration prescribes this as a necessary incident to them, and establishes it as a general principle, that wherever a traverse takes place, or, in other words, wherever a denial or contradiction of fact occurs in pleading, issue ought, at the same time, to be tendered on the fact denied. The reason is that as, by the contradiction, it sufficiently appears what is the issue or matter in dispute between the parties, it is time

(2) 1 Saund. 103; Meredith v. Alleyn, 1 Salk. 188; Carth. 116, S. C. Though this is considered as a solitary case (*vide* 1 Salk. 188), it may be observed that another analogous one is to be found. Gayle v. Betts, 1 Mod. 227.

(m) *Supra*, pp. 226 et seq.

¹ And Chief Justice Holt laid it down that in all other cases, "if a defendant pleads a special matter that admits and excuses a non-performance, the plaintiff need only answer and falsify the special matter alleged; for he that excuses a non-performance supposes it, and the plaintiff need not show that which the defendant hath supposed and admitted." See Meredith v. Alleyn, 1 Salk. 188.

¹³ Cooley's Black. (8d ed.) 313; 2 Bouvier's Institutes, § 2984; Labagh v. Cantine, 13 John. 272. A tender of issue is made by concluding to the country. Bindon v. Robinson, 1 John. 516; Labagh v. Cantine, 13 id. 272.

that the pleading should now close and that the method of deciding this issue should be adjusted.

The formulæ of tendering the issue in fact vary, of course, according to the mode of trial proposed.

The tender of an issue to be tried by *jury* is by a formula called the *conclusion to the country*. This conclusion is in the following words, when the issue is tendered by the *defendant*: "And of this the said C. D. puts himself upon the country." And of this the said C. D. puts himself upon the country." When it is tendered by the *plaintiff*, the formula is as follows: "And this the said A. B. prays may be inquired of by the country." (n) It is held, however, that there is no material difference between these two modes of expression, and that if *ponit se* be substituted for *petit quod inquiratur*, or *vice versa*, the mistake is unimportant. (o) Of the tender of issue, thus concluding to the country, several examples have already been given in this work, (p) and to these it will now be sufficient to refer.¹

The form of the issue, or mise, when, in a writ of right, the tenant puts himself upon the *grand assise*, is as follows:

PLEA.

In a writ of right. (q)

And the said C. D., by — — —, his attorney, comes and defends (r) the right of the said A. B., and the seisin of the said G. B., when, etc., and the whole, etc., and whatsoever, etc., and chiefly of the tenements aforesaid, with the appurtenances, as of fee and of right, etc.; and puts himself upon the grand assise of our lord the king, and prays recognition to be made whether he himself has greater right to hold the tenements aforesaid, with the appurtenances, to him and his heirs as tenants thereof, as he now holds them, or the said A. B. to have the said tenements, with the appurtenances, as he above demands them. (s)

(n) Heath's Maxims, 68; *Waltale v. Glover*, 10 Mod. 166; *Bract*, 57; *Ry. Plac. Parl.* 146.

(o) *Waltale v. Glover*, 10 Mod. 166.

(p) *Supra*, pp. 146, 152, 153.

(q) See the count, p. 109.

(r) "Defends" here means "denies." 3 Bl. Com. 297.

(s) Co. Ent. 181 b; 3 Bl. Com., Appendix, No. I, sec. 6; 3 Chitty, 652. See Appendix, note (55).

¹ *Bindon v. Robinson*, 1 Johns. 516; *Labagh v. Cantine*, 13 id. 270.

The form of tendering an issue to be tried *by record* is this:

PLEA

Of Judgment Recovered.

In assumpsit.

And the said C. D., by — — —, his attorney, comes and defends the wrong and injury when, etc., and says that the said A. B. ought not to have or maintain his aforesaid action against him, because he says that the said A. B. heretofore, to wit, in — — term, in the — — year of the reign of our lord the now king, in the court of our said lord the king, before the king himself, the same court then and still being holden at Westminster, in the county of Middlesex, impleaded the said C. D. in a certain plea of trespass on the case, on promises, to the damage of the said A. B. of — — pounds, for the not performing the same identical promises and undertakings in the said declaration mentioned. And such proceedings were thereupon had in the same court, in that plea, that afterwards, to wit, in that same term, the said A. B., by the consideration and judgment of the said court, recovered, in the said plea, against the said C. D., — — pounds for the damages which he had sustained, as well by reason of the not performing of the same promises and undertakings in the said declaration mentioned, as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. was convicted. As by the record and proceedings thereof remaining in the said court of our said lord the king, before the king himself, at Westminster aforesaid, more fully appears: Which said judgment still remains in full force and effect; not in the least reversed, satisfied or made void. And this the said C. D. is ready to verify by the said record. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action against him.

REPLICATION.

And the said A. B. says that by reason of anything in the said plea alleged he ought not to be barred from having and maintaining his aforesaid action against the said C. D., because he says that there is not any record of the said supposed recovery remaining in the said court of our said lord the king, before the king himself, in manner and form as the said C. D. hath above in his said plea alleged. And this he, the said A. B., is ready to verify, when, where and in such manner as the court here shall order, direct or appoint. (c)

The tender of an issue to be decided by *certificate, witnesses or inspection* is by the following formula: "And this the said A. B. [*or, C. D.*] is ready to verify, when, where and in such manner as the court here shall order, direct or appoint." (*u*)

The form of tendering an issue to be tried by *wager of law* is as follows:

PLEA

Of Nil Debet.

In debt on simple contract.

And the said C. D., in his own proper person, comes and defends the wrong and injury, when, etc., and says that he does not owe to the said A. B. the said sum of — pounds, above demanded, or any part thereof, in manner and form as the said A. B. hath above complained against him. And this he is ready to defend against him the said A. B., and his suit, as the court of our lord the king here shall consider, etc. (*x*)

With respect to the *extraordinary* methods of trial, their occurrence is too rare to have given rise to any illustration of the rule in question. It refers chiefly to traverses of such matters of fact as are triable by the *country*; and therefore we find it propounded in the books most frequently in the following form: *that, upon a negative and affirmative, the pleading shall conclude to the country; but otherwise, with a verification.* (*y*)¹

To the rule, in whatever form expressed, there is the following exception: *that when new matter is introduced the pleading should always conclude with a verification.* (*z*)²

To this exception belongs the case formerly noticed of *special traverses*. These, as already explained, never tender issue but always conclude with a verification; (*a*) and the reason seems to be, that in such of them as contain new matter in

(*u*) See Co. Ent. 180 b; Rast. 228; Thorne v. Rolfe, Moore, 14; Benl. 86; 3 Chitty, 590. *Qsere*, however, as to trial by inspection? See Booth, 147; 17 Ed. III, pl. 116; 24 Ed. III, 11. 10.

(*x*) Co. Ent. 119 a; Mod. Ent. 179; Lil. Ent. 467; 3 Chitty, 497.

(*y*) Com. Dig., Pleader (E. 32); 1 Saund. 108, n. 1.

(*z*) 1 Saund. 108, n. 1, and the authorities there cited; 2 Burr. 772; Vent. 121; Vere v. Smith, 2 Lev. 5; Sayre v. Minns, Cowp. 575.

(*a*) *Vide supra*, p. 246.

¹ Snyder v. Croy, 2 Johns. 428; 91; Morris v. Wadsworth, 11 Wend. Gazley v. Price, 16 id. 267; Terboss 100; Henderson v. Withy, 2 Term v. Williams, 5 Cow. 407. R. 576

² Service v. Heermance, 1 Johns.

the inducement, the introduction of that new matter will give the opposite party a right to be heard in answer to it, if the *absque hoc* be immaterial; and consequently makes a tender of issue premature. And on the other hand, with respect to such special traverses as contain no new matter in the inducement, they seem in this respect to follow the analogy of those first mentioned, though they are not within the same reason.

Not only in the case of special traverses, but in other instances also to which that form does not apply, a traverse may sometimes involve the allegation of new matter; and in all such instances, as well as upon a special traverse, and for a similar reason, the conclusion must be with a verification, and not to the country. Of this the following is an example: The plaintiff declared in debt on a bond conditioned for the performance of certain covenants by the defendant in his capacity of clerk to the plaintiff, one of which covenants was to account for all the money that he should receive. The defendant pleaded performance. The plaintiff replied that on such a day such a sum came to his hands which he had not accounted for. The defendant rejoined that he *did* account, and in the following manner: That thieves broke into the counting-house and stole the money, and that he acquainted the plaintiff of the fact; and he concluded with a verification. The court held that, though there was an express affirmative that he did account, in contradiction to the statement in the replication that he did not account, yet that the conclusion with a verification was right; for that *new matter* being alleged in the rejoinder, the plaintiff ought to have liberty to come in with a surrejoinder and answer it by traversing the robbery. (b)

The application, however, to particular cases, of this exception as to the introduction of *new matter*, is occasionally nice and doubtful; and it becomes difficult sometimes to say whether there is any such introduction of new matter as to make the tender of the issue improper. Thus, in debt on a bond conditioned to render a full account to the plaintiff of all such sums of money and goods as were belonging to W. N. at the time of his death, the defendant pleaded that no goods

(b) Vere v. Smith, 2 Lev. 5; Vent. 121.

or sums of money came to his hands. The plaintiff replied that a silver bowl which belonged to the said W. N. at the time of his death came to the hands of the defendant, viz., on such a day and year; "and this he is ready to verify," etc. On demurrer it was contended that the replication ought to have concluded to the country, there being a complete negative and affirmative; but the court thought it well concluded, as new matter was introduced. However, the learned judge who reports the case thinks it clear that the replication was *bad*; and Mr. Sergeant Williams expresses the same opinion, holding that there was *no* introduction of new matter such as to render a verification proper. (c)

RULE III.

✓ § 136. Issue, when well tendered, must be accepted. (d)¹—

If issue be well tendered, both in point of substance and in point of form, nothing remains for the opposite party but to accept or join in it; and he can neither demur, traverse, nor plead in confession and avoidance.

The acceptance of the issue in case of a conclusion to the country, *i. e.*, of trial by jury, may (as explained in the first chapter) (e) either be added in making up the issue or paper-book, or may be filed or delivered before that transcript is made up. It is in both cases called the *similiter*, and in the latter case a *special similiter*. The form of a special *similiter* is thus: "And the said A. B." [*or*, "C. D."] "as to the plea" [*or*, "replication," etc.] "of the said C. D." [*or*, "A. B."], "whereof he hath put himself upon the country" [*or*, "whereof he hath prayed it may be inquired by the country"], "doth the like." The *similiter*, when added in making up the issue or paper-book, is simply this: "And the said A. B." [*or*, "C. D."] "doth the like."

As the party has no option in accepting the issue when well

(c) *Hayman v. Gerrard*, 1 Saund. 102. But see *Cornwallis v. Savery*, Burr. 772, which seems to coincide in principle with the case in *Saunders*. See, also, *Sayre v. Minns*, Cowp. 575.

(d) *Bac. Ab.*, Pleas, etc., p. 363 (5th ed.); *Digby v. Fitzharbert*, Hob. 104. "In all pleadings wherover a traverse was first properly taken, the issue closed." *Gillb. C. P.* 66.

(e) *Supra*, p. 165.

¹ That is, there cannot be a traverse *v. Winship*, 16 Pick. 291; *Hapgood v. Houghton*, 8 id. 450.

tendered, and as the *similiter* may in that case be added for him, the acceptance of the issue when well tendered may be considered as a mere matter of *form*.¹ It is a form, however, which should be invariably observed, and its omission has sometimes formed a ground of successful objection, even after verdict. (*f*).²

The rule expresses that the issue must be accepted only when it is *well* tendered. For if the opposite party thinks the *traverse* bad in substance or in form, or objects to the *mode of trial* proposed, in either case he is not obliged to add the *similiter*, but may *demur*; and, if it has been added for him, may strike it out and demur. (*g*)

The *similiter*, therefore, serves to mark the acceptance both of the question itself and the mode of trial proposed. It seems originally, however, to have been introduced in a view to the *latter* point only. The resort to a jury, in ancient times, could in general be had only by the mutual *consent* of each party. (*h*) It appears to have been with the object of expressing such consent that the *similiter* was in those times added in drawing up the record, and from the record it afterwards found its way into the written pleadings. Accordingly no *similiter* or other acceptance of issue is necessary, when recourse is had to any of the *other modes* of trial; and the rule in question does not extend to these. Thus, when issue is tendered to be tried by the *record*, as in the above example, p. 288, the plaintiff is entitled to consider the issue as complete upon such tender, (*i*) and no acceptance of it on the other side is essential.

The rule in question extends to an issue in *law* as well as an

(*f*) Griffith v. Crockford, 3 Brod. & Bing. 1. But see 2 Saund. 819, n. 6, and Tidd, 947 (6th ed.).

(*g*) Vide *supra*, p. 107.

(*h*) See Appendix, note (34). It may be observed that this is still indicated by the form of the *venire facias*, which contains the formal clause, "because as well the said C. D. as the said A. B.," etc., "have put themselves upon that jury." Vide *supra*, p. 172.

(*i*) Tiffany v. Johnson, 3 Bos. & Pul. 303. And see Booth, 96, as to the mise on a writ of right.

¹ It may be added by either party. *issue*. Gillespie v. Smith, 29 Ill. 473; Stumps v. Kelley, 22 Ill. 140; Davis v. Hazen v. Pierson, 83 id. 241.

Ransom, 26 id. 100. It is not necessary to a negative plea, *e. g.*, general ² McCully v. Silverburgh, 18 Ill. 306. Cf. Davis v. Ransom, *supra*; Walker v. Armour, 23 Ill. 658.

issue in *fact*;¹ for by analogy (as it would seem) to the *similiter*, the party whose pleading is opposed by a demurrer is required formally to accept the issue in law which it tenders by the formula called a *joinder in demurrer*, of which an example was given in the first chapter. (k) However, it differs in this respect from the *similiter*, that whether the issue in law be well or ill tendered, that is, whether the demurrer be in proper form or not, the opposite party is equally bound to join in demurrer. For it is a rule *that there can be no demurrer upon demurrer*, (l) because the first is sufficient, notwithstanding any inaccuracy in its form, to bring the record before the court for their adjudication; and, as for *traverse* or *pleading in confession and avoidance*, there is of course no ground for them while the last pleading still remains unanswered, and there is nothing to oppose but an exception in point of law.

(k) *Supra*, p. 149.

(l) *Bac. Ab., Pleas, etc. (N.), 2.*

¹ *Clay Fire Ins. Co. v. Wuster-* issue in fact, see *Keener v. Finger,*
hausen, 75 Ill. 285. As to what is an 70 N. C. 43.

CHAPTER VI.

(ORIGINAL SECTION II.)

RULES WHICH TEND TO SECURE THE MATERIALITY OF THE ISSUE

RULE I

§ 137. Traverse must not be taken on an immaterial allegation. (*m*)—

This rule prohibits, first, the taking of a traverse on matter either *irrelevant* or *insufficient in law*. Thus, in debt for rent against a lessee for years, if the defendant plead that before the rent was due he assigned the term to another, of which the plaintiff had notice, a traverse of the *notice* would be bad, as producing an immaterial issue; for it is not mere notice of the assignment that discharges the lessee, but the lessor's consent to the assignment or his acceptance of rent from the assignee. (*n*) So in an action of debt on bond conditioned for the payment of *ten pounds ten shillings* at a certain day, if the defendant should plead payment of *ten pounds*, a traverse of such payment would be bad, for if the whole sum of ten pounds ten shillings were not paid, the bond would be forfeited; and the payment of a less sum is wholly immaterial. (*o*) The plaintiff in such case should demur.¹

Again, this rule prohibits the taking of a traverse on matter of *inducement*; (*p*)² that is, matter which is only by way of introduction and explanatory, or matter of *aggravation*; (*q*)³ that is, matter which only tends to increase the amount of damages, and does not concern the right of action itself. Thus,

(*m*) Com. Dig., Pleader (R. 8), (G. 10); Bac. Ab., Pleas, etc. (H.), 5.

(*n*) 1 Lev. 32.

(*o*) Hob. 113.

(*p*) Com. Dig., Pleader (G. 14).

(*q*) 13 Mod. 597.

¹ Rogers v. Burk, 10 Johns. 400; ² See Gledstane v. Hewitt, 1 C. & J. Thompson v. Fellows, 21 N. H. 425; 565; Clement v. Flight, 16 M. & W. 42. Caulfield v. Sanders, 17 Cal. 569; ³ Razor v. Qualla, 4 Blackf. 286, 30 Castro v. Wetmore, 16 id. 379; Am. Dec. 638; Havens v. H. & N. H. Thurman v. Wild, 11 Ad. & El. 453. Ry., 28 Conn. 69.

in an action of debt against executors, they pleaded a judgment recovered, and that there were no assets in their hands beyond what was sufficient to satisfy the said judgment. The plaintiff replied that the judgment was satisfied, but kept on foot by fraud and covin. The defendant traversed that the judgment was satisfied; and this was considered as a bad traverse, because to allege that it was satisfied was only inducement to the allegation that it was kept on foot by fraud and covin. This was the main point, and this should have been the subject of the traverse. (r) But if a matter, though alleged in the form of inducement, is not *merely* of that quality, but of the substance of the cause, it may, in some cases, be traversed. Thus, where the plaintiff declared, in trespass on the case for slander, that he was sworn before the lord mayor, and that the defendant said he was falsely sworn in that oath, it was held that the plaintiff's being sworn before the lord mayor, though in the nature of inducement, was a traversable matter, being of the substance of the action. (s)

§ 138. But it is a rule that where there are several material allegations it is in the option of the pleader to traverse which he pleases. (t) Thus, in trespass, if the defendant pleads that A. was seised and demised to him, the plaintiff may traverse either the seisin or the demise. (u)¹ Again, in trespass, the defendant pleads that A. was seised and enfeoffed B., who enfeoffed C., who enfeoffed D., whose estate the defendant hath; in this case the plaintiff may traverse which of the feoffments he pleases. (x)

The principle of this rule is sufficiently clear; for it is evident that where the case of any party is built upon several allegations, each of which is essential to its support, it is as effectually destroyed by the demolition of any one of these parts as of another.

(r) Com. Dig., Pleader (G. 14); Hardr. 70.

(s) *Kinnersley v. Cooper*, Cro. Eliz. 168. See also, *Carvick v. Blagrove*, 1 Brod. & Bing. 551.

(t) Com. Dig., Pleader (G. 10); *Read's Case* [cited in *Simpson v. Hartopp*, Willes, 512, 1 Sm. L. C. (9th Am. ed.) 725], 6 Rep. 24; Doct. Pl. 365; Bac. Ab., Pleas, etc. (H.), 5, p. 892 (8th ed.); 1 Lutw. 101.

(u) Com. Dig., Pleader (G. 10); Hardr. 317.

(x) Doct. Pl. 305.

¹ *Hopkins v. Medley*, 97 Ill. 402; 210; *Learmunth v. Grandine*, 4 M. Heydon v. Thompson, 1 Ad. & El. & W. 658.

RULE II.

§ 139. A traverse must not be too large, nor, on the other hand, too narrow. (y)¹—

As a traverse must not be taken on an immaterial allegation, so when applied to an allegation that is material it ought, in general, to take in no more and no less of that allegation than is material. If it involves *more*, the traverse is said to be too *large*; if less, too *narrow*.

A traverse may be too large by involving in the issue: quantity, time, place or other circumstances which, though forming part of the allegation traversed, are immaterial to the merits of the cause. Thus, in an action of debt on bond, conditioned for the payment of £1,550, the defendant pleaded that part of the sum mentioned in the condition, to wit, £1,500, was won by gaming, contrary to the statute in such case made and provided, and that the bond was consequently void. The plaintiff replied that the bond was given for a just debt, and traversed that the £1,500 was won by gaming in manner and form as alleged. On demurrer it was objected that the replication was ill, because it made the precise sum parcel of the issue, and tended to oblige the defendant to prove that the whole sum of £1,500 was won by gaming; whereas the statute avoids the bond if *any part* of the consideration be on that account. The court was of opinion that there was no color to maintain the replication; for that the material part of the plea was that *part* of the money for which the bond was given was won by gaming, and that the words, "to wit, £1,500," were only form, of which the replication ought not to have taken any notice. (z) So where the plaintiff pleaded that the queen, at a manor court, held on such a day by I. S., her steward, and by copy of court roll, etc., granted certain land to the plaintiff's lessor, and the defendant rejoined, traversing that the queen at a manor court, held such a day by I. S., her steward, granted the land to the lessor, the court held that the traverse was ill, "for the jury are thereby bound to find a copy on such a

(y) 1 Saund. 268, n. 1, 269, n. 2; Com. Dig., Pleader (G. 15), (G. 16).

(z) Colborne v. Stockdale, Str. 498; 8 Mod. 58, S. C. [cited in 1 Sm. L. C. (9th Am. ed.) 657].

¹ Arlett v. Ellis, 7 Taunt. 346; Stubbs v. Lainson, 1 M. & W. 728; Weaver v. Lloyd, 2 B. & C. 678; Wadhams v. Swan, 109 Ill. 46.

day, and by such a steward, which ought not to be." The traverse, it seems, ought to have been that the queen *did not grant in manner and form as alleged.* (a)

Again, a traverse may be too large by being taken in the *conjunctive* instead of the *disjunctive*, where it is not material that the allegation traversed should be proved conjunctively. Thus, in an action of *assumpsit*, the plaintiff declared on a policy of insurance and averred "that the ship insured did not arrive in safety, but that the said ship, tackle, apparel, ordnance, munition, artillery, boat and other furniture were sunk and destroyed in the said voyage." The defendant pleaded with a traverse, "Without this, that the said ship, tackle, apparel, ordnance, munition, artillery, boat *and* other furniture were sunk and destroyed in the voyage in manner and form as alleged." Upon demurrer this traverse was adjudged to be bad, and it was held that the defendant ought to have denied disjunctively that the ship *or* tackle, etc., was sunk or destroyed; because in this action for damages the plaintiff would be entitled to recover compensation for any part of that which was the subject of insurance and had been lost; whereas (it was said), if issue had been taken in the conjunctive form in which the plea was pleaded, "and the defendant should prove that only a cable or anchor arrived in safety, he would be acquitted of the whole." (b)¹

§ 140. On the other hand, however, a party may, in general, traverse a material allegation of title or estate to the extent to which it is alleged, though it need not have been alleged to that extent; and such traverse will not be considered as too large. (c) For example, in an action of replevin, the defendant avowed the taking of the cattle as damage feasant, in the place in which, etc.; the same being the freehold of Sir F. L. To this the plaintiff pleaded that he was seised in his demesne as of fee of B. close, adjoining to the place in which, etc.; that Sir F. L. was bound to repair the fence between B. close and the place in which, etc.; and

(a) *Lane v. Alexander*, Yelv. 122.

(b) *Goram v. Sweeting*, 2 Saund. 206.

(c) Com. Dig., Pleader (G. 16); 2 Saund. 207 a, n. 24; *Wood v. Buddin*, Hob. 119; Yelv. 196; 1 Chitty, 586. 2 Str. 818, is apparently *contra*; but from the report of the same case, *Ld. Ray*, 1830, it may be reconciled with the other authorities.

¹ *Moser v. Jenkins*, 5 Oreg. 447; *Leroux v. Murdock*, 51 Cal. 541.

that the cattle escaped through a defect of that fence. The defendant traversed that the plaintiff *was seised in his demesne as of fee* of B. close, and on demurrer the court was of opinion that it was a good traverse; for though a less estate than a seisin in fee would have been sufficient to sustain the plaintiff's case, yet as the plaintiff, who should best know what estate he had, had pleaded a seisin in fee, his adversary was entitled to traverse the title so laid. (d) Again, in an action of trespass for trespasses committed in a close of pasture containing eight acres in the town of Tollard Royal, the defendant pleaded that W., Earl of Salisbury, was seised in fee and of right of an ancient chase of deer called Cranborn, and that the said chase did extend itself as well in and through the said eight acres of pasture as in and through the said town of Tollard Royal, and justified the trespasses as committed in using the said chase. The plaintiff traversed *that the said chase extended itself as well to the eight acres as to the whole town*; and issue being taken thereon, it was tried and found for the plaintiff. It was then moved, in arrest of judgment, "that this issue and verdict were faulty because if the chase did extend to the eight acres only it was enough for the defendant; and therefore the finding of the jury that it did not extend as well to the whole town as to the eight acres did not conclude against the defendant's right in the eight acres, which was only in question. But it was answered by the court that there was no fault in the issue, much less in the verdict (which was according to the issue), but the fault was in the defendant's plea; for he puts in his plea more than he needed, viz., the whole town, which being to his own disadvantage and to the advantage of the plaintiff, there was no reason for him to demur upon it, but rather to admit it, as he did, and so to put it in issue. And so judgment was given for the plaintiff." (e)

§ 141. Of a traverse too narrow, the following is an example: In an action of *assumpsit* brought for a compensation for the plaintiff's service as a hired servant, the plaintiff alleged that he served from March 21, 1647, to November 1, 1664; the defendant pleaded that the plaintiff continued in

(d) Sir Francis Leke's Case, Dyer, 364 b; 2 Saund. 303 a, n. 22.

(e) Wood v. Budden, Hob. 119.

the service till December, 1658, and then voluntarily quitted the service; *without this, that he served until November 1, 1664*. This was a bad traverse; for as the plaintiff in this action for damages is entitled to compensation *pro tanto* for any period of service, it is obviously no answer to say that he did not serve the whole time alleged. (f) So a traverse may be too narrow by being applied to part only of an allegation which the law considers as in its nature indivisible and entire; such as that of a prescription or grant. Thus, in an action of trespass for breaking and entering the plaintiff's close, called S. C., and digging stones therein, the defendant pleaded that there are certain wastes lying open to one another — one the close called S. C., and the other called S. G.,— and so proceeded to prescribe for the liberty of digging stones in both closes, and justified the trespasses under that prescription. The replication traversed the prescriptive right in S. C. *only*, dropping S. G.; but the court held that the traverse could not be so confined and must be taken on the whole prescription as laid. (g)

(f) *Osborn v. Rogers*, 1 Saund. 207, 208, n. 1 [3 Sm. L. C. (9th Am. ed.) 771].

(g) *Morewood v. Wood*, 4 T. R. 157 [cited, 1 Sm. L. C. (9th Am. ed.) 224]

CHAPTER VII.

(ORIGINAL SECTION III.)

OF RULES WHICH TEND TO PRODUCE SINGLENESS OR UNITY IN THE ISSUE

RULE I.

§ 142. Pleadings must not be double. (h)¹—

This rule applies both to the declaration and subsequent pleadings. Its meaning, with respect to the former, is that the declaration must not, in support of a single demand, allege several distinct matters, by any one of which that demand is sufficiently supported. With respect to the subsequent pleadings the meaning is that none of them is to contain several distinct answers to that which preceded it; and the reason of the rule in each case is, that such pleading tends to several issues in respect of a single claim. (i)

The rule, it may be observed, in its terms points to *double-ness* only, as if it prohibited only the use of *two* allegations or answers of this description; but its meaning, of course, equally extends to the case of more than two, the term *double-ness* or *duplicity* being applied (though with some inaccuracy) to either case.

Of this rule, as applied to the *declaration*, the following is an example: The plaintiff declared in debt on a penal bill, (k) by which the defendant was to pay ten shillings on the 11th of June, and ten shillings upon the 10th of July next following, and ten shillings every three weeks after, till a certain total sum was satisfied by such several payments; and by the

(h) Com. Dig., Pleader (C. 33), (E. 2), (F. 16); Bac. Ab., Pleas, etc. (K.); *Humphreys v. Bethily*, 2 Vent. 198.

(i) *La cause est pur ceo, que deux issues purroient estre pris sur les plees.* Per Finchden, 40 Ed. 3, 45. See, also, 15 Ed. 4, 1.

(k) *Bills penal* are instruments not now in use, having been superseded by *bonds with conditions*. The example in the text would therefore not occur in modern practice, but serves equally well the purpose of illustration.

¹ *Bryan v. Buford*, 7 J. J. Marsh. *Connelly v. Pierce*, 7 Wend. 129. But (Ky.) 335; *Welch v. Jamison*, 2 Miss. see *Ewing v. Shaw*, 83 Ala. 333. 160; *Taft v. Brewster*, 9 Johns. 334;

said bill the defendant bound himself for the true payment of the said several sums, in the penal sum of seven pounds; and the plaintiff alleged that the defendant did not pay the said *total sum, or any part thereof, upon the several days aforesaid*; whereby an action had accrued to him to demand the said penalty of seven pounds. This was held bad for duplicity. For, if the defendant had failed in payment of *any one* of the sums, such failure would alone be a breach of the condition, and sufficient to entitle the plaintiff to the penalty he claimed; and the plaintiff ought, therefore, to have confined himself to the allegation of the non-payment of one of those sums only. (l) So, where the plaintiff declared in *assumpsit* that the defendant was indebted to him in such a sum for nourishing one E. L. at the request of the defendant, which the latter promised to pay, and also that the defendant promised to pay him so much as he reasonably deserved to have for nourishing the said E. L. during the same time, this was bad for duplicity; and, indeed, also for repugnancy (another fault in pleading that will be hereafter considered), as the two promises—to pay a sum certain, and to pay *quantum meruit*—were inconsistent and could not stand together. (m)

Of duplicity in *pleadings subsequent to the declaration*, the following example occurs in a *plea in abatement*. The defendant pleaded, in disability of the person of the plaintiff, ten different outlawries adjudged against him; and it was held that the plea was ill for duplicity, because the plaintiff was disabled as well by one outlawry as by the whole ten. (n) The following is an instance of duplicity in a *plea in bar*: In trespass for breaking a close, and depasturing the herbage with cattle, if the defendant pleads that A. had a right of common, and B. also a right of common in the close, and that the defendant, as their servant, and by their command, entered and turned in the cattle in exercise of their rights of common, the plea is bad for duplicity; (o) because the title of either one or other of the commoners, and the authority derived as his servant, would have alone constituted

(l) *Humphreys v. Bethily*, 2 Vent. 196, 222.

(m) *Hart v. Longfield*, 7 Mod. 148. As to duplicity in the declaration, see, also, *Cornwallis v. Savery*, 2 Burr. 773; *Manser's Case*, 2 Rep. 4.

(n) *Trevellian v. Secomb*, Carth. 8. See Appendix, note (56).

(o) Vin. Ab., tit. Double Pleas (A.), 114, cites 15 Hen. 7, 10.

a sufficient answer to the declaration. Duplicity in the *replication* may be thus exemplified: The plaintiff declared in trespass for breaking and entering his stable, cutting asunder a beam, and throwing down the tiles of the roof. The defendant justified, as servant to Sir H. G.; and pleaded that Sir H. G. was seised of a wall in his demesne as of fee, and because the beam was placed in the wall of the said Sir H. G. without his consent, the defendant, as his servant, in order to remove this nuisance, did enter the stable and cut the beam as near to the wall as he could, doing as little damage as possible; and thereby the tiles were thrown down. The plaintiff replied, traversing that the wall was Sir H. G.'s; and then, with a protestation that the wall was not his, farther pleaded that the defendant, of his own wrong, did throw down the tiles for the cutting the beam as aforesaid. The court held that the first traverse being a complete answer to the whole, the second made the replication double. (*p*)

§ 143. Singleness relates to a single claim.—The object of this rule being to enforce a single issue upon a *single subject of claim* admitting of several issues, where the claims are *distinct*, (*q*) the rule is, accordingly, carried no farther than this in its application. The *declaration*, therefore, may, in support of *several demands*, allege as many distinct matters as are respectively applicable to each.¹ Thus, let one of the examples above given, with respect to the declaration, be so far varied as to substitute for the case of an action in debt on a penal bill for the penalty accrued in consequence of non-payment of a sum by several instalments, the case of an action of covenant on a covenant to pay that sum by similar instalments. In this latter case the plaintiff might, without duplicity, declare that the defendant “did not pay the said total sum, or any part thereof, upon the several days aforesaid.” For he does not, as in the action upon the penal bill, found

(*p*) *Humphrey v. Churchman*, Rep. temp. Hard. 230.

(*q*) *Supra*, p. 213.

¹ There is no occasion to cite authority to support the text; the only difficulty is to ascertain what facts or how many facts will constitute but a single cause or defense. The arguments and opinion in *Ferguson v. Meredith*, 1 Wall. 26, constitute one of the best illustrations in the books. See, also, *Stearns v. Stearns*, 32 Vt. 678; *Garland v. Davis*, 4 How. 181; *Willey v. Carpenter*, 64 Vt. 212; *Kipp v. Bell*, 86 Ill. 577.

upon such non-payments a single claim, viz., the claim to the penalty of seven pounds; there being no penalty in question, his claims are multiplied in proportion to the number of non-payments; that is, he is entitled to ten shillings in respect of the first default, and ten shillings more upon each of the rest. The allegation of several defaults is, therefore, in this case, the allegation of so many distinct demands, and consequently allowable. (r) So the *plea*, though it must not contain several answers to the whole of the declaration, may nevertheless make distinct answers to such parts of it as relate to different matters of claim or complaint. (s) Thus, in the preceding example of duplicity in a plea in bar, if the case were a little varied, and the defendant, being charged with putting five beasts on the common, had pleaded that A. and B. had respectively rights of common there, and that he, as the servant of A., put in two of the beasts in respect of *his* common right, and, as the servant of B., put in three in respect of *his* common right, there would no longer be duplicity; for he pleads the several titles, not as several answers to the same subject of claim or complaint, but as distinct answers to different matters of complaint arising in respect of different cattle. (t) So in the *replication* and other subsequent parts of the series, a severance of pleading may take place in respect of several subjects of claim or complaint. Thus, if an action be brought for trespasses in closes A. and B., and defendant pleads a single matter of defense applying to both closes, the plaintiff is still at liberty, in his replication, to give one answer as to so much of the plea as applies to close A., and another answer as to so much of the plea as applies to close B. (u)

The power, however, of alleging in a plea distinct matters in answer to such parts of the declaration as relate to different claims, seems to be subject to this restriction: that neither of the matters so alleged be such as would alone be a sufficient answer to the whole. Thus, if an action be brought on two bonds, though the defendant may plead, as to one, payment, and as to the other, duress, yet if he pleads as to one a release

(r) See Bac. Ab., Pleas, etc., p. 446, 5th ed.

(s) Com. Dig., Pleader (E. 2); Co. Litt. 304 a.

(t) Vin. Ab., tit. Double Pleas (A.), 115.

(u) See an example in *Johns v. Whitley*, 3 Wils. 127.

of all actions, and as to the other, duress, it will be double, for the release is alone a sufficient answer to both bonds. (x)

§ 144. *Several defendants.*—Again, if there be *several defendants*, the rule against duplicity is not carried so far as to compel each of them to make the same answer to the declaration. Each defendant is at liberty to use such plea as he may think proper for his own defense; and they may either join in the same plea, or sever, at their discretion. (y)¹ But if the defendants have once united in the plea, they cannot afterwards sever at the rejoinder, or other later stage of the pleading.²

Where, in respect of several subjects or several defendants, a severance has thus taken place in the pleading, this may of course lead to a corresponding severance in the whole subsequent series, and (as the ultimate effect) to the production of *several issues*. And where there are several issues, they may respectively be decided in favor of different parties, and the judgment will follow the same division.³

Such being, in general, the nature of duplicity, the following rules or points of remark will tend to its further illustration:

§ 145. *Illustrations of duplicity.*—1. *A pleading will be double that contains several answers, whatever be the class or quality of the answer.*⁴ Thus it will be double by containing several matters in *abatement*, or several matters in *bar*; (z) or by containing *one matter in abatement*, and *another in bar*. (a) So a pleading will be double by containing several matters in

(x) Doct. Pl., p. 136; 18 Vin Ab., tit. Double Pleas (D.). In Viner, however, some cases are cited which show that this restriction has not been uniformly observed, or is at least to be taken with several exceptions.

(y) Co. Litt. 303 a. It is said, however, *Essington v. Boncher*, Hob. 245, that they cannot sever in *dilatory pleas*. *Sed qu.* See *Cuppledick v. Terwhit*, Hob. 250.

(z) Com. Dig., Pleader (E. 2); and see the cases already cited on the subject of duplicity.

(a) *Semb.* Com. Dig., Pleader (E. 2); *Bleeke v. Grove*, 1 Sid. 176.

¹ In such case the plea must show same defense they must set it up in a good defense to all or it will be one plea. *Meagher v. Bachelder*, 6 Mass. 444.

it professes. *Earl of Manchester v. Yeazel v. Alexander*, 58 Ill. 254; *Vale*, 1 Saund. 28, n.; *Gleason v. Baker v. Mich. S. & N. I. Ry.*, 42 id. 73; *Cooley on Torts* (2d ed.), 157.

Edmunds, 2 Scam. 448; *Bradley v. Powers*, 7 Cow. 330; 1 *Waterman* ⁴ See *People v. Raisin & L. E. R. Co.*, 12 Mich. 389.

on *Trespass*, § 81.

² But in contract if all claim the

confession and avoidance, or several answers by way of *traverse*; or by combining a *traverse* with a matter in *confession and avoidance*. (b)

2. *Matter may suffice to make a pleading double, though it be ill pleaded.* Thus, in trespass for assault and battery, the defendant pleaded that he committed the trespasses in the moderate correction of the plaintiff, as his servant, and farther pleaded that since that time the plaintiff had discharged and released to him the said trespasses, without alleging, as he ought to have done, a release *under seal*. The court held that this plea was double — the moderate correction and the release being a matter of defense; and though the release was insufficiently pleaded, yet as it was a matter that a material issue might have been taken upon, it sufficed to make the plea double. (c)

§ 146. *Matter not constituting duplicity.*— 3. *Matter immaterial cannot operate to make a pleading double.* (d)¹ Thus, in an action by the executor of J. G., on a bond conditioned that the defendant should warrant to J. G. a certain meadow, the defendant pleaded that the said meadow was copyhold of a certain manor, and that there is a custom within the manor that if the customary tenants fail in payment of their rents and services, or commit waste, then the lord for the time being may enter for forfeiture; and that the said J. G., during his life, peaceably enjoyed the meadow, which descended after his death to one B., his son and heir, who, of his own wrong, entered without the admission of the lord against the custom of the manor, and because three shillings of rent were in arrear on such a day the lord entered into the meadow, as into lands forfeited. On demurrer it was objected (among

(b) Com. Dig., Pleader (E. 2); Bac. Ab., Pleas, etc. (K.); and see the cases already cited.

(c) Bac. Ab., Pleas, etc. (K.), 2; Bleeke v. Grove, Sid. 175; Keble, 661.

(d) Bac. Ab., Pleas, etc. (K.), 2; 1 Hen. 7, 16; Executors of Grenellfe, Dyer, 42b.; Doct. PL 138. There is, however, a dictum of Doddridge, J., that a plea may be double though only one of the matters be material (Calfe v. Nevil, Poph. 196), but the weight of the authorities and the reason of the thing are opposed to this opinion.

¹ Lord v. Tyler, 14 Pick. 156; Perry 238; Smith v. Holmes, 54 id. 105; v. Marsh, 25 Ala. 659; Penton v. Hamilton v. Smith, 39 id. 222. Cf. land, 17 Johns. 92; Hereford v. Vaughan v. Evarts, 40 Vt. 526; James Crow, 3 Scam. 423; Comstock v. v. Dunlap, 2 Scam. 481; Hopkins v. Evoy, 52 Mich. 324; Monaghan v. Medley, 97 Ill. 402. Agricultural Fire Ins. Co., 53 id.

other things) that the plea was double, because in showing the forfeiture to have accrued by the heir's own wrongful act, two several matters are alleged: First, that he entered without admission, against the custom; secondly, that three shillings of rent were in arrear. But the judges held that the only sufficient cause of forfeiture was the non-payment of rent; that there being no custom alleged for forfeiture in respect of entry without admission, the averment of such entry was mere surplusage, and could not therefore avail to make the plea double. (e) It is, however, to be observed that the plea seems to *rely* on the non-payment of the rent as the only ground of forfeiture; for it alleges that "because three shillings of the rent were in arrear the lord entered;" and the court noticed this circumstance. The case, therefore, does not explicitly decide that where two several matters are not only pleaded, but *relied upon*, the immateriality of one of them shall prevent duplicity; but the manner in which the judges express themselves seems to show that the doctrine goes to that extent, and there are other authorities the same way. (f)

§ 147. *Material matter ill pleaded.*— This doctrine, that a plea may be rendered double by matter *ill pleaded*, but not by *immaterial* matter, quite accords with the *object* of the rule against duplicity, as formerly explained. (g) That object is the avoidance of several issues. Now, whether a matter be well or ill pleaded, yet if it be sufficient in substance, so that the opposite party may go to issue upon it if he chooses to plead over without taking the formal objection, such matter tends to the production of a separate issue, and is on that ground held to make the pleading double. On the other hand, if the matter be immaterial, no issue can properly be taken upon it; it does not tend, therefore, to a separate issue, nor, consequently, fall within the rule against duplicity.

§ 148. *Inducement.*— 4. *No matter will operate to make a pleading double that is pleaded only as necessary inducement to another allegation.* Thus, it may be pleaded without duplicity, that after the cause of action accrued the plaintiff (a

(e) Executors of Grenellfe, Dyer, 42.

(f) Bac. Ab., Pleas, etc. (K.), 2.

(g) *Supra*, p. 302; and see, also, p. 213.

woman) took husband, and that the husband afterwards released the defendant; for though the coverture is itself a defense as well as the release, yet the averment of the coverture is a necessary introduction to that of the release. (A) This exception to the general rule is prescribed by an evident principle of justice; for the party has a right to rely on any single matter that he pleases in preference to another, as in this instance on the release in preference to the coverture; but if a necessary inducement to the matter on which he relies, when itself amounting to a defense, were held to make his pleading double, the effect would be to exclude him from this right, and compel him to rely on the inducement only.¹

§ 149. **Many facts constituting one point.**— 5. *No matters, however multifarious, will operate to make a pleading double, that together constitute but one connected proposition or entire point.*² Thus, to an action for assault and imprisonment, if the defendant plead that he arrested the plaintiff on suspicion of felony, he may set forth any number of circumstances of suspicion, though each circumstance may be alone sufficient to justify the arrest; for all of them taken together do but amount to one connected cause of suspicion. (2) This qualification of the rule against duplicity applies not only to pleadings in confession and avoidance, but to traverses also; so that a man may deny as well as affirm, in pleading any number of circumstances that together form but a single point or proposition. Thus, in an action of trespass for breaking the plaintiff's close and depasturing it with cattle, the defendant pleaded a right of common in the close for the said cattle, being his own commonable cattle, levant and couchant upon the premises. The plaintiff in the replication traversed, "that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises and commonable cattle." On demurrer for duplicity it was objected that there were three distinct facts put in issue by this replica-

(A) Bac. Ab., Pleas, etc. (K.), 2; Com. Dig., Pleader (E. 2).

(2) Vin. Ab., Double Pleas (A.), 7, cites 2 Ed. 4, 8.

¹ 1 Burr. 320.

² Russell v. Rogers, 15 Wend. 351; ker v. Brink, 24 N. J. L. 333; Potter v. Titcomb, 10 Me. 53; Willey v. Carpenter, 64 Vt. 212. See cases cited Gaffney v. Colwell, 6 Hill, 567; Ferguson v. Meredith, 1 Wall. 25; Har-

ante, § 148, n. 1.

tion, any one of which would be sufficient by itself; but the court held that the point of the defense was, that the cattle in question were entitled to common; that this *point* was single, though it involved the *three several facts* that the cattle were the defendant's own, that they were levant and couchant, and that they were commonable cattle; that the replication traversing these facts, in effect, therefore, only traversed the single point whether the cattle were entitled to common, and was consequently not open to the objection of duplicity. (k) The most frequent instance of this cumulative traverse, as it may be called, occurs in the case of the replication *de injuria absque tali causa*. This replication (it will be recollected) alleges that the defendant did the act (the subject of complaint) of his own wrong, and "*without the cause alleged;*" and this *cause* frequently consists of several connected circumstances, of which the example formerly given (l) may serve as an illustration. It is, however (as was formerly stated), (m) a restriction in the use of this replication, that it cannot be applied so as to include in the traverse any matter alleged on the other side in the nature of *title, interest, authority* or *matter of record*. If, therefore, any such matter be contained in the plea, and the plaintiff wishes to deny it, such matter must be traversed separately; or if he chooses not to point the denial to this, but to other matters in the plea, these other matters must separately form the subject of traverse. In the former case the denial is in the words of the allegation; in the latter, the usual form is to plead with a protestation, and a traverse *de injuria absque residuo causæ*; thus: "protesting that the said C. D. is not seized, etc., for replication, nevertheless, in this behalf, the said A. B. says that the said C. D., of his own wrong, and *without the residue of the cause* in his said plea alleged, broke and entered the said close, etc." (n) And it is to be observed that this restitution, by which matter of *title, interest, authority, or record*, is required to be separately traversed, is not to be taken as applicable merely to the use of the replication *de injuria*, but extends (it is conceived), in its principle, to *all* cases of cumulative

(k) *Robison v. Rayley*, 1 Burr. 316.

(l) *Supra*, p. 242.

(m) *Supra*, p. 242.

(n) See the precedents, 9 Went. 327; 2 Chitty, 644.

traverse; so that it may be said to be generally true, that where any such matter is alleged in connection with other circumstances, it is not a case in which it is competent to the other party to traverse cumulatively; (o) and that if he include all these circumstances in the same traverse, his pleading will be double.

§ 150. The general issue as construed has become in truth a double plea.¹—In some cases the *general issues* appear to partake of the nature of these cumulative traverses. For some of them are so framed as to convey a denial, not of any particular fact, but generally of the whole matter alleged — as *not guilty*, in trespass or trespass on the case, and *nil debet*, in debt. And in *assumpsit* the case is the same in effect, according to a relaxation of practice formerly explained, (p) by which the defendant is permitted, under the general issue, in that action, to avail himself (with some few exceptions) of any matter tending to disprove his liability. The consequence is that under these general issues the defendant has the advantage of disputing, and therefore of putting the plaintiff to the proof of, every averment in the declaration. Thus, by pleading *not guilty* in trespass *quare clausum fregit*, he is enabled to deny at the trial both that the land was the plaintiff's and that he committed upon it the trespasses in question, and the plaintiff must establish both these points in evidence. Indeed, besides this advantage of double *denial*, the defendant obtains, under the general issue in *assumpsit* and other actions of trespass on the case, the advantage of double *pleading in confession and avoidance*. For as, upon the principles formerly explained, (q) he is allowed in these actions to bring forward, upon the general issue, almost any matters (though in the nature of confession and avoidance) which tend to disprove his debt or liability, so he is not limited (as he would be in special pleading) to a reliance on any single matter of this description, but may set up any number of these defenses. While such is the effect of many of the general issues in mitigating or evading the rule against duplicity, the remark does not apply to all. Thus the general

(o) See Bul. NI. Pri. 98.

(p) *Supra*, p. 236.

(q) *Supra*, pp. 236, 238.

¹ See General Issue.

issue of *non est factum* raises only a single question, namely, whether the defendant executed a valid and genuine deed such as is alleged in the declaration. The defendant may, under this plea, insist that the deed was not executed by him, or that it was executed under circumstances which annul its effect as a deed, but can set up no other kind of defense.

§ 151. *Of several counts and several pleas.*—The rule against duplicity in pleading being now explained, (*r*) it is necessary, in the next place, to advert to certain *modes of practice* by which the effect of that rule is materially qualified and evaded. These are the use of *several counts* and the allowance of *several pleas*, the former being grounded on ancient practice, the latter on the Stat. 4 Ann, ch. 16.

Several counts: First shall be considered the subject of *several counts*.

Where the plaintiff has several distinct causes of action he is allowed to pursue them cumulatively in the same original writ, subject to certain rules which the law prescribes as to joining such demands only as are of similar quality or character. (*s*)¹ Thus he may join a claim of debt on bond with a claim of debt on simple contract, and pursue his remedy for both by the same original writ in debt. So if several distinct trespasses have been committed, these may all form the subject of one original writ in trespass; but, on the other hand, a plaintiff cannot join in the same suit a claim of debt on bond and a complaint of trespass, these being dissimilar in kind. (*t*) Where a plaintiff thus makes several demands by the same writ, his course of proceeding in debt, covenant and detinue, and the real and mixed actions (where the writs are in a simple and general form), (*u*) is merely to enlarge his claim in point of sums and quantities; but in trespass and trespass on the case (where the form is more special), (*x*) the original writ

(*r*) See Appendix, note (57).

(*s*) Upon this subject, see Bac. Ab., Actions (C).

(*t*) See Appendix, note (58).

(*u*) See the forms of writs in the first chapter.

(*x*) Ibid.

¹ Tregent v. Maybee, 54 Mich. 226; man v. Palmer, 77 id. 51; Gardner v. McKenzie v. Hatton, 59 N. Y. St. R. Ogden, 22 id. 327; Cook v. Warren, 695; Gray v. Tobias, 17 Wend. 562; 88 id. 87; Ogdensburgh v. Van Rensselaer, 6 Hill, 240.

separately specifies each subject of claim or complaint. For example, if the action be brought in trespass for two assaults and batteries, the original writ, after setting forth one, proceeds to detail the other. And when the time for the *declaration* arrives, the plaintiff, in *all* forms of action, sets forth in the declaration separately each different subject of claim or complaint thus put together in the same writ. So, in the case of proceeding by *bill*, the different claims or complaints are separately brought forward in the bill or declaration; care, however, being taken to join only such as might have been jointly claimed by the same original. Such different claims or complaints constitute different parts or sections of the declaration, and are known in pleading by the description of *several counts*. (y)¹

§ 152. **Examples of several counts.**—But in order to give the unlearned reader an exact idea of the nature of several counts, it will be necessary (though it lead to the insertion of some very common and well-known forms) to lay before him the following examples:

DECLARATION

In Trespass.

For assault and battery.

In the King's Bench.

(By original.)

— Term, in the — year of the reign
of King George the Fourth.

— to wit, C. D. was attached to answer A. B. of a plea wherefore he, the said C. D., with force and arms, at —, in the county of —, made an assault upon the said A. B., and beat, wounded and ill-treated him, so that his life was despaired of. *And also*, wherefore, with force and arms, at — aforesaid, in the county aforesaid, the said C. D. made another assault upon the said A. B., and again beat, wounded and ill-treated him, so that his life was despaired of, and other wrongs to him there did, to the damage of the said A. B., and against the peace of our lord the now king. And thereupon the said A. B., by — —, his attorney, complains: *For that* the said C. D. heretofore, to wit, on the — day of

(y) See Appendix, note (59).

¹ Several breaches of a bond or several instalments due on a contract 344; *Hibbard v. McKindley*, 28 *id.* 240; *People v. Harmon*, 15 *Ill. App.* 189. may be joined in one count. *Consolidated Coal Co. v. Peers*, 150 *Ill.*

—, in the year of our Lord —, with force and arms, at —, in the county of —, made an assault upon the said A. B., and beat, wounded and ill-treated him, so that his life was despaired of. *And also for that* the said C. D. heretofore, to wit, on the day and year aforesaid, with force and arms, at — aforesaid, in the county aforesaid, made another assault upon the said A. B., and again beat, wounded and ill-treated him, so that his life was despaired of, and other wrongs to him then and there did, against the peace of our said lord the king, and to the damage of the said A. B. of — pounds. And therefore he brings his suit, etc. (z)

DECLARATION

In Assumpsit.

*For goods sold, work done, money lent, etc.*¹

In the King's Bench.

(By original.)

— Term, in the — year of the reign of King George the Fourth.

— to wit, C. D. was attached to answer A. B. of a plea of trespass on the case. And thereupon the said A. B., by — his attorney, complains: For that, whereas the said C. D. heretofore, to wit, on the — day of —, in the year of our Lord —, at —, in the county of —, was indebted to the said A. B. in the sum of — pounds of lawful money of Great Britain, for divers goods, wares and merchandises by the said A. B. before that time sold and delivered to the said C. D. at his special instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said sum of money when he, the said C. D., should be thereto afterwards requested. *And whereas also*, the said C. D. afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of — pounds of like lawful money, for work and labor, care and diligence by the said A. B. before that time done, performed and bestowed in and about the business of the said C. D., and for the said C. D., at his like instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested. *And whereas also*,

(z) See the declaration with a count for one assault and battery only, *supra*, p. 117.

¹The common money counts. See Common Counts.

the said C. D. afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of — pounds of like lawful money, for so much money by the said A. B. before that time lent and advanced to the said C. D., at his like instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested. *And whereas also*, the said C. D. afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of — pounds of like lawful money, for so much money by the said A. B. before that time paid, laid out and expended to and for the use of the said C. D., at his like instance and request; and being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested. *And whereas also*, the said C. D. afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, was indebted to the said A. B. in the farther sum of — pounds of like lawful money, for so much money by the said C. D. before that time had and received to and for the use of the said A. B.; and, being so indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested. *And whereas also*, the said C. D. afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, accounted with the said A. B. of and concerning divers other sums of money from the said C. D. to the said A. B. before that time due and owing and then in arrear and unpaid; and upon that account the said C. D. was then and there found to be in arrear and indebted to the said A. B. in the farther sum of — pounds of like lawful money; and being so found in arrear and indebted, he, the said C. D., in consideration thereof, afterwards, to wit, on the day and year aforesaid, at — aforesaid, in the county aforesaid, undertook and faithfully promised the said A. B. to pay him the said last-mentioned sum of money when he, the said C. D., should be thereto afterwards requested. Yet the said C. D., not regarding his said several promises and undertakings, but contriving and fraudulently intending, craftily and subtilly, to deceive and defraud the said A. B. in this be-

half, hath not yet paid the said several sums of money, or any part thereof, to the said A. B. (although oftentimes afterwards requested). But the said C. D. to pay the same, or any part thereof, hath hitherto wholly refused, and still refuses, to the damage of the said A. B. of — pounds; and therefore he brings his suit, etc. (a)

When several counts are thus used the defendant may, according to the nature of his defense, demur to the whole, or plead a single plea applying to the whole, or may demur to one count and plead to another, or plead a several plea to each count; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings and the production of *several issues*.¹ But whether one or more issues be produced, if the decision, whether in law or fact, be in the plaintiff's favor as to any one or more counts, he is entitled to judgment *pro tanto* though he fail as to the remainder.

§ 153. *Several counts for a single cause.*— The use of several counts, when applied to *distinct causes of action*, is quite consistent with the rule against duplicity; for the object of that rule, as formerly explained, (b) is to prevent several issues in respect of the same demand only; there being no objection to several issues where the demands are several. But it happens more frequently than otherwise that when various counts are introduced they do *not* really relate to distinct claims, but are adopted merely *as so many different forms of propounding the same cause of action*, and are therefore a mere evasion of the rule against duplicity. This is a relaxation of very ancient date, and has long since passed, by continual sufferance, into allowable and regular practice. It takes place when the pleader, in drawing the declaration or bill in any action, or in preparing the *præcipe* (c) for an original writ in trespass or trespass on the case, after having set forth his case in one view, feels doubtful whether as so stated it may not be insufficient in point of law, or incapable of proof in point of fact, and at the same time perceives another mode of statement by which the apprehended difficulty may probably be avoided. Not choosing to rely on either view of the case

(a) See the declaration in *assumpsit*, with a count for *goods sold only*, *supra*, p. 120.

(b) *Supra*, p. 308.

(c) As to the *præcipe*, *vide supra*, p. 98.

¹ Gould's Pleading (5th ed.), 391; *Hopkins v. Medley*, 97 Ill. 403.

exclusively, he takes the course of adopting both; and accordingly inserts the second form of statement in the shape of a second count, in the same manner as if he were proceeding for a separate cause of action. If, upon the same principle, he wishes to vary still farther the method of allegation, he may find it necessary to add many other succeeding counts besides the second; and thus in practice a great variety of counts often occurs in respect of the same cause of action, the law not having set any limits to the discretion of the pleader in this respect, if fairly and rationally exercised.¹

§ 154. Common counts for one cause of action.—It may be desirable, however, to explain more particularly in what case, and with what objects, resort is had to several counts in respect of the same cause of action. This may happen either where the state of facts to which each count refers is really different, or where the same state of facts is differently represented. The first case may be exemplified in the instance formerly cited, of an action of debt on a penal bill, whereby the defendant engaged to pay 7*l.* as penalty in the event of non-payment of 10*s.* on the 11th of June, and 10*s.* more on the 10th of July, and 10*s.* every three weeks after till a certain sum were satisfied. Let it be supposed that the plaintiff complains of a failure in payment both on the 11th of June and 10th of July. Either failure entitles him to the penal sum for which he brings the action; but if he states them both in the same count, the declaration, as we have seen, will be double. (d) The case, however, may be such as to make it

(d) *Supra*, pp. 302, 303.

¹ The use of several counts in cases where there is but one cause of action is so common that it need not be illustrated further than the cases we cite from the code states serve that purpose. It was supposed that, in accordance with the theory that no fictions could be indulged in code pleading, a party could not be permitted to state his cause in several forms, and if there was but one cause there could be but one count. *Sturgis v. Burton*, 8 Ohio St. 215. The note to that case in 72 American Dec. 582, states the law practically

as it stood prior to 1885, but this idea has given way to the necessities and conveniences of the profession, and in many states they have returned to the common-law rule. The court exercises a sound discretion against unnecessary prolixity. *Pearson v. M. & St. P. Ry.*, 45 Ia. 497; *Brinkman v. Hunter*, 73 Mo. 172; *Whitney v. C. & N. W. Ry.*, 27 Wis. 327; *Wilson v. Saltiel*, 61 Cal. 209; *Leonard v. Roberts* (Colo.), 36 Pac. Rep. 880; *Manders v. Craft*, 3 Colo. App. 236. *Cf. Jansen v. Railway Co.*, 6 Utah, 253.

convenient to rely on both defaults; for there may be a doubt whether one or other of the payments were not made, though it may be certain that there was at least one default; and if, under these circumstances, the plaintiff should set forth one of the defaults, and the defendant should take issue upon it, he might defeat the action by proving payment on the day alleged, though he would have been unable to prove the other payment. To meet this difficulty the pleader might resort to two counts. The first of these would set forth the penal bill, alleging a default of payment on the 11th of June; the second would again set forth the same bill, describing it as "a certain *other bill*," etc., and would allege a default on the 10th of July. The effect of this would be that the plaintiff, at the trial, might rely on either default, as he might then find convenient. In this instance the several counts are each founded on a *different state of facts* (viz., a different default in payment), though in support of the same demand; but it more frequently happens that it is the *same state of facts differently represented* which forms the subject of different counts. Thus, where a man has ordered goods of another, and an action is brought against him for the price, the circumstances may be conceived to be such as to raise a doubt whether the transaction ought to be described as one of *goods sold and delivered*, or of *work and labor done*; and in this case there would be two counts setting forth the claim both ways, exactly as in the two first counts of the last example, in order to secure a verdict, at all events, upon one of them. And it may be useful to observe here, that upon this principle the four last counts of that example, viz., those for *money lent and advanced*, *money paid*, *money had and received*, and *money due on an account stated* (commonly called the *money counts*),¹ are, some or all of them, generally inserted, as a matter of course, in every *præcipe*, declaration, or bill in *assumpsit*, though the cause of action be also stated in a more special form in other counts. This is done because it often happens that, when the special counts are found incapable of proof at the trial, the cause of action will resolve itself into one of these general pecuniary forms of demand, and thus the plaintiff may obtain a verdict

¹ These are the common counts. See index, Common Counts.

on one of these money counts though he fail as to all the rest.¹ Again, the same state of facts may be varied by omitting in one count some matter stated in another. In such a case the more special count is used, lest the omission of this matter should render the other insufficient in point of law; the more general count is adopted because if good in point of law it will relieve the plaintiff from the necessity of proving such omitted matter in point of fact. If the defendant demur to the latter count as insufficient, and take issue in fact on the former, the plaintiff has the chance of proving the matter alleged and also the chance of succeeding on the demurrer. If, on the other hand, the defendant do not think proper to demur, but take issue in fact on both, the plaintiff will have no occasion, at the trial, to rely at all upon the former count, but will succeed by merely proving the latter.

It is to be observed that whether the subjects of several counts be *really* distinct or identical they must always *purport* to be founded on distinct causes of action and not to refer to the same matter; and this is effected by the insertion of such words as "other," "the farther sum," etc., as in the above examples. This is evidently rendered necessary by the rule against duplicity, which, though *evaded* as to the declaration by the use of several counts in the manner here described, is not to be directly *violated*. (e)

§ 155. Of several pleas.—The next subject for consideration is that of *several pleas*.

It has been already stated that the rule against duplicity does not prevent a defendant from giving distinct answers to

(e) Hart v. Longfield, 7 Mod. 148; West v. Troles, 1 Salk. 213; Bac. Ab., Pleas, etc. (B.).

¹There can be no doubt as to the application of these rules in the code states. The use of the common count is too firmly established, and the right to vary the form of statement in order to prevent a variance is also admitted. The idea of a single statement of a single cause is well enough in theory; but every practicing lawyer knows of the difficulty of stating a cause which will fit his evidence and at the same time embrace the modifying effect of the evidence for the defendant. It is often difficult to anticipate how court and jury will construe the evidence which must be adduced but cannot be pleaded. The practical good sense of the profession has overcome the theoretical idea. Solomon v. Vinson, 31 Minn. 205; Culver v. Marks, 123 Ind. 554, 17 Am. St. R. 377; Baltzell v. Nosler, 1 Ia. 588, 63 Am. Dec. 466; Fisk v. Fink, 12 Wis. 276, 78 Am. Dec. 737. See, also, cases cited in note 2, p. 108, and p. 315, n.

different claims or complaints on the part of the plaintiff. (f) To several counts, or to distinct parts of the same count, he may therefore plead several pleas, viz.: one to each. Thus, in an action of trespass for two assaults and batteries, he may plead, as to the first count, not guilty, and as to the second, the statute of limitations, viz.: that he was not guilty within four years; and the following is an example of the form in which this may be done:¹

§ 156. Same — Examples.—

PLEAS.

In trespass for assault and battery. (g)

And the said C. D., by — —, his attorney, comes and defends the force and injury when, etc.; and *as to the first count* of the said declaration, the said C. D. says that he is not guilty of the said trespasses therein mentioned, or any part thereof, in manner and form as the said A. B. hath above thereof complained. And of this the said C. D. puts himself upon the country. And *as to the second count* of the said declaration, the said C. D. says that the said A. B. ought not to have or maintain his aforesaid action thereof against him, because he says that he, the said C. D., was not at any time within four years next before the commencement of this suit, guilty of the said trespasses in the said second count mentioned, or any part thereof; in manner and form as the said A. B. hath above complained. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action thereof against him.

But it may also happen that a defendant may have several distinct answers to give to the *same* claim or complaint. Thus, to an action of trespass for two assaults and batteries, he may have ground to deny both the trespasses, and also to allege that they were neither of them committed within four years. Anterior, however, to the regulation which will be presently mentioned, it was not competent to him to plead these several answers to both trespasses, as that would have been an

(f) *Supra*, p. 308.

(g) See the declaration, *supra*, p. 811.

¹ The privilege of several pleas is to be used by leave of court and under sound judicial discretion. *Clay v. Fire Ins. Co.*, 75 Ill. 285; *Miliken v. Jones*, 77 id. 372; *Ulmer*, 74 Pa. St. 402; *Watriss v. Pierce*, 36 N. H. 236; *Blake v. Eldred*, 18 How. Pr. 240; *Montague v. Boston, etc. Iron Works*, 97 Mass. 502; *Jackson v. Stetson*, 15 Mass. 48; *Bell v. Brown*, 22 Cal. 671; *Peters v.*

infringement of the rule against duplicity. The defendant was therefore obliged to elect between his different defenses, where more than one thus happened to present themselves; and to rely on that which, in point of law and fact, he might deem most impregnable.¹ But as a mistake in that selection might occasion the loss of the cause, contrary to the real merits of the case, this restriction against the use of several pleas to the same matter, after being for ages observed in its original severity, was at length considered as contrary to the true principles of justice, and was accordingly relaxed by legislative enactment. The Stat. 4 Ann, ch. 16. sec. 4, provides that "it shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin, in any court of record, with leave of the court, to plead as many several matters thereto as he shall think necessary for his defense." Since this act the course has been, for the defendant, if he wishes to plead several matters to the same subject of demand or complaint, to apply previously for a rule of court permitting him to do so; and upon this, a rule is accordingly drawn up for that purpose. The form of pleading several pleas where leave is thus granted will appear by the following example:

PLEAS.

In trespass for assault and battery. (h)

And the said C. D., by — — —, his attorney, comes and defends the force and injury when, etc, and says that he is not guilty of the said trespasses above laid to his charge, or any part thereof, in manner and form as the said A. B. hath above thereof complained. And of this the said C. D. puts himself upon the country. *And for a farther plea* in this behalf, the said C. D., by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said A. B. ought not to have or maintain his aforesaid action against him, because he says that he, the said C. D., was not at any time within four years next before the commencement of this suit, guilty of the said trespasses in the said declaration mentioned, or any part thereof, in manner and form as the said A. B. hath above complained. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action against him.

(h) See the declaration, *supra*, p. 311.

¹ See *Auburn & O. Canal Co. v. Leitch*, 4 Den. 65, Ames' Cases, 81.

When several pleas are pleaded, either to different matters, as in page 318, or (by virtue of the statute of Anne) to the same matter, as in the last example, the plaintiff may, according to the nature of his case, either demur to the whole, or demur to one plea and reply to the other, or make a several replication to each plea; and in the two latter cases the result may be a corresponding severance in the subsequent pleadings and the production of *several issues*. But whether one or more issues be produced, if the decision, whether in law or fact, be in the defendant's favor as to any one or more pleas, he is entitled to judgment, though he fail as to the remainder; *i. e.*, he is entitled to judgment in respect of that subject of demand or complaint to which the successful plea relates; and, if it were pleaded to the whole declaration, to judgment generally, though the plaintiff should succeed as to all the other pleas.

By a relaxation similar to that which has obtained with respect to *several counts*, the use of *several pleas* (though presumably intended by the statute to be allowed only in a case where there are really several grounds of defense) (*2*) is, in practice, carried much farther. For it was soon found that when there was a matter of defense by way of special plea, it was generally expedient to plead that matter in company with the general issue, whether there were any real ground for denying the declaration or not; because the effect of this is to put the plaintiff to the proof of his declaration before it can become necessary for the defendant to establish his special plea; and thus the defendant has the chance of succeeding, not only on the strength of his own case, but by the failure of the plaintiff's proof.¹ Again, as the plaintiff, in the case of several counts, finds it convenient to vary the mode of stating the same subject of claim, so, for similar reasons, defendants were led, under color of pleading distinct matters of defense, to state variously in various pleas the same de-

(2) See *Lord Clinton v. Morton*, 2 Str. 1000.

¹ Under the statutes allowing several pleas, or the general issue with notice of special matter, which are substantial re-enactments of the statutes of Anne the defendant may plead the general issue and special pleas, or the general issue and notice, but he may not combine notice with special pleas. *Gilmore v. Nowland*, 26 Ill. 200.

fense; and this, either by presenting it in an entirely new view, or by omitting, in one plea, some circumstances alleged in another. To this extent, therefore, is the use of several pleas now carried; and, accordingly, the form of pleading, in the last of the above examples, would in practice be adopted, instead of that in the first, whether the truth of the case really warrants a denial of both counts or not. Some efforts, however, were at one time made to restrain this apparent abuse of the indulgence given by the statute. For that *leave of the court* which the statute requires was formerly often refused where the proposed subjects of plea appeared to be *inconsistent*; and on this ground leave has been refused to plead, to the same trespass, *not guilty*, and *accord and satisfaction*, or *non est factum* and *payment* to the same demand. (k) In modern practice, however, such pleas, notwithstanding the apparent repugnancy between them, are permitted; (l)¹ and the only pleas, perhaps, which are now disallowed on the mere ground of inconsistency are those of the general issue and a *tender*.

On the subject of several pleas it is to be farther observed that the statute extends to the case of pleas *only* and not to *replications* or *subsequent pleadings*. These remain subject to the full operation of the common law against duplicity, so that though to each plea there may (as already stated) be a separate replication, (m) yet there cannot be offered to the same plea more than a single replication, nor to the same replication more than one rejoinder, and so to the end of the series. The legislative provision allowing several matters of *plea* was confined to that case under the impression, probably, that it was in that part of the pleading that the hardship of the rule against duplicity was most seriously and frequently felt, and that the multiplicity of issues which would be occasioned by a farther extension of the enactment would have been attended with expense and inconvenience more than equivalent

(k) Com. Dig., Pleader (E. 2).

(l) *Vide* 1 Sel. Pract. 290; 2 Chitty, 522; Chitty v. Hume, 13 East, 255.

(m) *Supra*, p. 320.

¹ See cases cited *supra*, p. 317; practice in England by Rules Hil also Buhler v. Wentworth, 17 Barb. Term, 4 Will. IV., and Duere v. Trieb- 649. But see the regulation of this ner, 5 M. & S. 103.

to the advantage. The effect, however, of this state of law is somewhat remarkable. For example: It empowers a defendant to plead to a declaration in *assumpsit* for goods sold and delivered, 1, the general issue; 2, that the cause of action did not accrue within six years; 3, that he was an infant at the time of the contract. On the first plea the plaintiff has only to join issue, but with respect to each of the two last he may have several answers to give. The case may be such as to afford either of these replications to the statute of limitations, viz., that the cause of action *did* accrue within six years, or that at the time the cause of action accrued he was *beyond sea*, and that he commenced his suit within six years after his return. So, to the plea of infancy: he may have ground for replying either that the defendant was *not* an infant, or that the goods for which the action is brought were *necessaries* suitable to the defendant's condition in life. Yet, though the defendant had the advantage of his three pleas, cumulatively, the plaintiff is obliged to make his election between these several answers, and can reply but one of them to each plea.¹

§ 157. *Limitation of rule.*—It is also to be observed that the power of pleading several matters extends to pleas in *bar* only, and not to those of the *dilatory* class, with respect to which the leave of the court will not be granted. (n)

Again, it is to be remarked that the statute does not operate as a total abrogation, even with respect to pleas in *bar*, of the rule against duplicity. For, first, it is necessary (as we have seen) to obtain *the leave of the court*² to make use of several matters of defense, and then the several matters are pleaded formally with the words, "by leave of the court for this purpose first had and obtained," in the manner shown

(n) See 1 Sel. Pract. 275.

¹ Every plea must stand or fall by pleadings. *Bartlett v. Prescott*, 41 itself. *Grills v. Mannell*, Willes, 378; N. H. 493. See, also, *Nye v. Spencer*, 41 Me. 272; *Alderman v. French*, 1 Potter v. Earnest, 45 Ind. 416. Each plea and pleading stands on its own ground, and is not affected by any other plea; and the admissions made in pleading one plea, or found in one lot of pleadings, cannot be used as cause of demurrer or as matter of evidence in issues joined in other

² If the defendant files pleas improperly without leave, the proper practice is to move to strike them from the files. *Miliken v. Jones*, 77 Ill. 372.

in the example. (o) The several defenses must also each be pleaded as a *new* or *farther* plea, with a formal commencement and conclusion as such; so that notwithstanding the statute, and the leave of the court obtained in pursuance of it, to plead several matters, it would still be improper to incorporate several matters in *one* plea in any case in which the plea would be thereby rendered double at common law. .

Such is the nature and extent of the rule against double pleading and of the modifications to which in practice it is subject. Under this rule it remains only to observe that if, instead of demurring for duplicity, the opposite party passes the fault by and pleads over, he is in that case bound to answer each matter alleged, and has no right, on the ground of the duplicity, to confine himself to any single part of the adverse statement. (p)

RULE II.

§ 158. It is not allowable both to plead and to demur to the same matter. (q)¹—

This rule depends on exactly the same principles as the last. As it is not allowable to *plead* double, lest several issues in fact in respect of the same matter should arise, so it is not permitted both to *plead and demur* to the same matter, lest an issue in fact and an issue in law in respect of a single subject should be produced. The party must therefore make his election.

The rule, however, it will be observed, only prohibits the pleading and demurring *to the same matter*. It does not forbid this course as applicable to *distinct statements*. Thus a man may plead to one count or one plea and demur to another. The reason of this distinction is sufficiently explained by the remarks already made on the subject of duplicity in pleading.

Lastly, it is to be remarked that the statute of Anne, which authorizes the pleading of *several pleas*, gives no authority for *demurring and pleading* to the same matter. The rule now in question, therefore, is not affected by that provision, but remains in the same state as at common law.

(o) *Supra*, p. 319.

(p) *Bolton v. Cannon*, 1 Vent. 272.

(q) *Bac. Ab., Pleas, etc. (K.)*, 1.

¹ *Auburn & O. Canal Co. v. Leitch*, 4 Den. 65, Ames' Cases, 81.

CHAPTER VIII

(ORIGINAL SECTION IV.)

OF RULES WHICH TEND TO PRODUCE CERTAINTY OR PARTICULARITY IN THE ISSUE

RULE I.

✓ § 159. The pleadings must have certainty of place. (r) —

The rules tending to certainty in the pleadings and, by consequence, certainty in the issue, are very numerous, and in their nature do not easily admit of methodical arrangement; but an enumeration shall here be attempted of such of them as appear to be of principal importance.

It was formerly explained (s) that the nature of the trial by jury, while conducted in the form which first belonged to that institution, was such as to render particularity of *place* absolutely essential in all issues which a jury was to decide. Consisting, as the jurors formerly did, of witnesses or persons in some measure cognizant of their own knowledge of the matter in dispute, they were of course, in general, to be summoned from the particular place or neighborhood where the fact happened; (t) and, in order to know into what county the *venire facias* for summoning them should issue, and to enable the sheriff to execute that writ, it was necessary that the issue, and therefore the pleadings out of which it arose, should show particularly what that place or neighborhood was. (u) Such place or neighborhood was called *the venue* or *visne* (from *vicinetum*), (x) and the statement of it in the pleadings obtained the same name; to allege the place being, in the language of pleading, to *lay the venue*.

(r) Com. Dig., Pleader (C. 20); Ibid., Abatement (H. 13); Co. Litt. 125 a.

(s) *Vide supra*, p. 214.

(t) Co. Litt. by Harg. 125 a, n. 1. "The venire was to bring up the *parces* of the place where the fact was laid in order to try the issue; and originally every fact was laid in the place where it was really done; and therefore the written contracts bore date at a certain place." Gilb. Hist. C. P. 84.

(u) *Ilderton v. Ilderton*, 2 H. Bl. 161. Per Lord Mansfield, *Mostyn v. Fabrigas*, Cowp. 176; Co. Litt. 125 a, b. See 2 Hen. VII., 4.

(x) Bac. Ab., Visne or Venue (A.); 3 Bl. Com. 294.

The present law of venue may be stated as follows:¹

First, the *original writ* must be directed to the sheriff of some county, and in that county the *action* is said to be *brought* or *laid*. Each affirmative traversable allegation in the writ is to be laid with a venue or place, comprising not only the *county* in which the fact arose, but the *parish, town, (y) or hamlet*, within the county; (*z*) but in a mere denial, of course, no venue is to be used; nor is any required in respect of facts not traversable,—for example matter of inducement or aggravation. (*a*) The pleader has his election to lay either the parish, the town or the hamlet; but a more extensive division than a parish (for example, a hundred) is not a sufficient venue, that having apparently been considered in ancient times as too large an allegation of place to instruct the sheriff properly as to the summoning of the jurors. (*b*) Of the different facts alleged in the writ, it is necessary that some principal one, at least, should be laid in some parish, town or hamlet within the county in which *the action is brought*, in order to justify the bringing of the action in that county; (*c*) and such county, and the particular place so laid within it, are called the *venue in the action*, or the *venue where the action is laid*.

The *declaration*, as it conforms to the writ in other particulars, (*d*)² so it adheres of necessity to the same venue. The county where the action is laid is placed at the commencement and in the margin of the declaration, (*e*) and all the dif-

(y) A town is, in pleading, otherwise called *vill*. 1 Bl. Com. 114.

(z) Co. Litt. 125 a; Com. Dig., Abatement (H. 13); *Ibid.*, Pleader (C. 20); *Bradish v. Bishop*, Cro. Eliz. 260. Per Buller, J., *The King v. Holland*, 5 T. R. 620; *Amory v. Brodrick*, 2 Barn. & Ald. 71r.

(a) Com. Dig., Pleader (C. 20), cites Pl. Com. 190 b.

(b) Co. Litt. by Harg, 125, n. 1. If the fact happened out of any parish, town or hamlet, but in some other *known place*, such as a forest, or the like, such *known place* may be laid for venue. Co. Litt. 125 a, b.; Bac Ab., Visne (E.), in marg. And if it happened out of any parish, town, hamlet, or *known place*, the venue may be laid in the county generally. Bac. Ab., *ibid.*

(c) See *The King v. Burdett*, 4 Barn. & Ald. 175, 176; *Calvin's Case*, 7 Rep. 1.

(d) *Vide supra*, pp. 107, 108.

(e) See the forms of declaration in the first chapter.

¹See Local or Transitory Actions. that all pleading must conform to

²Here reference may be made to some definite theory. *Ætna Powder Co. v. Hildebrand* (Ind., 1894), 87 N. E. Rep. 136; *Wilson v. Johnson* (N. J.), 29 Atl. Rep. 419. See Pom. Code under any form of procedure, viz: Rem., §§ 558, 559.

ferent affirmative traversable allegations are to be laid with venue of parish, town or hamlet, as well as county, (f) in the same manner as above explained with regard to the writ and in accordance with that instrument.

In proceedings by *bill* the law of venue is exactly the same as that already described, subject only to the difference necessarily introduced by the absence of the original writ, the only effect of which is that the declaration instead of the original first determines where the *action is laid*; and as in proceedings by original the *action* is said to be *brought* or *laid* in the county into which the writ issues, so, in proceedings by bill, it is said to be *brought* or *laid* in the county named in the margin of the declaration. Again, as in proceedings by original, the county into which the writ issues, and the place within that county at which the principal fact is laid, are called the *venue in the action*, so in proceedings by bill the same term applies to the county in the margin of the declaration and the place within that county laid to the principal fact.

Whether the action be by original or by bill, the *plea*, *replication* and *subsequent pleadings* lay a venue to each affirmative traversable allegation, according to the principles already stated, until issue are joined.

It having been stated that the original object of thus laying a venue was to determine the place from which the *venire facias* should direct the jurors to be summoned in case the parties should put themselves upon the country, it will be proper now to consider how far the same use is made of the venue in modern practice. And in order to explain clearly the existing law on this subject, it will be convenient to take a short retrospect of its former state and progress.

§ 160. Ancient reason for rule.—The most ancient practice, as established at the period when juries were composed of persons cognizant of their own knowledge of the fact in dispute, was of course to summon the jury from that venue which had been laid to the particular fact *in issue*; and from the venue of *parish, town or hamlet*, as well as county. (g) Thus, in an action of debt on bond, if the declaration alleged the

(f) See the authorities cited in p. 325, note (x).

(g) Co. Litt. 125 a; Bac. Ab., *Venue* or *Venue* (E). And see an illustrative case, 43 Ed. III., 1.

contract to have been made at Westminster, in the county of Middlesex, and the defendant in his plea denied the bond, issue being joined on this plea, it would be tried by a jury from Westminster. Again, if he pleaded an affirmative matter, as, for example, a release, he would lay this new traversable allegation with a venue; and if this venue happened to differ from that in the declaration, being laid, for example, at Oxford, in the county of Oxford, and issue were taken on the plea, such issue would be tried by a jury from Oxford and not from Westminster. (h) And it may here be incidentally observed that, as the place or neighborhood in which the fact arose, and also the allegation of that place in the pleadings, was called the *venue*, so the same term was often applied to the jury summoned from thence. Thus it would be said in the case last supposed, that *the venue was to come from Oxford*. With respect to the *form* of the venire at this period, it was as follows: *Venire facias duodecim liberos et legales homines, de vicineto de W. (or O.) (i. e., the parish, town or hamlet) per quos rei veritas melius sciri poterit, etc.* (i)

While such appears to have been the most ancient state of practice, (k) it soon sustained very considerable changes. When the jury began to be summoned no longer as witnesses, but as judges, and, instead of being cognizant of the fact on their own knowledge, received the fact from the testimony of others judicially examined before them, the reason for summoning them from the immediate neighborhood ceased to apply; and it was considered as sufficient if, by way of partial conformity with the original principle, a *certain number of the jury* came from the same *hundred* in which the place laid for venue was situate, though their companions should be of the county only, and neither of the venue, nor even of the hundred. This change in the manner of executing the venire did not, however, occasion any alteration in its *form*, which still directed the sheriff, as in former times, to summon the

(h) 1 Saund. 247; Com. Dig., Action (N. 12); 45 Ed. III., 15; 3 Reeves, 110.

(i) *De vicineto tali* (is the expression of Bracton) *per quos rei veritas melius sciri poterit, etc.* Bract. 309 b, 310 a, 396 b, 307 a. In the statute 27 Eliz., ch. 6, sec. 1, the form is, *12 liberos et legales homines de vicineto de B., per quos rei veritas, etc.* And see Litt. sec. 234.

(k) See Appendix, note (60).

whole jury from the particular venue. (*l*) The number of hundredors which it was necessary to summon was different at different periods; in later times no more than *two* hundredors were required in a personal action. (*m*)

In this state of the law was passed the statute 16 and 17 Car. II., ch. 8. By this act (which is one of the statutes of jeofails) it is provided "that, after verdict, judgment shall not be stayed or reversed for that there is no right venue, so as the cause were tried by a jury of the proper county or place *where the action is laid*." This provision was held to apply to the case (among others) where issue had been taken on a fact laid with a different venue from that *in the action*, but where the venire had improperly directed a jury to be summoned from the *venue in the action*, instead of the venue *laid to the fact in issue*. (*n*) This had formerly been matter of error, and therefore ground for arresting or reversing the judgment; (*o*) but by this act (passed with a view of removing what had become a merely formal objection) the error was cured and the staying or reversal of the judgment disallowed. While such was its direct operation, it has had a farther effect, not contemplated, perhaps, by those who devised the enactment. For what the statute only purported to cure as an error it has virtually established as regular and uniform practice; and issues taken on facts laid with a different venue from that *in the action* have for a long time past been constantly tried, not by a jury of the venue laid to the *fact in issue*, but by a jury of the *venue in the action*. (*p*)

Another change was introduced by the statute 4 Ann, ch. 16, sec. 6. This act provides that "every *venire facias* for the trial of any issue shall be awarded of the *body* of the proper county where such issue is triable," instead of being (as in the ancient form) awarded from the particular venue of parish, town or hamlet. From this time, therefore, the form of the venire has been changed, and directs the sheriff to summon twelve good and lawful men, etc., "from the body of his

(*l*) 27 Eliz., ch. 6, sec. 1; Litt., sec. 234.

(*m*) 27 Eliz., ch. 6, sec. 5. See Appendix, note (61).

(*n*) Craft v. Boite, 1 Saund. 247.

(*o*) 1 Saund. 247, n. 1; 2 Saund. 5, n. 3; Bowyer's Case, Cro. Eliz. 486; Eden's Case, 6 Rep. 15 b; Co. Litt. by Harg. 126 a, n. 1.

(*p*) 2 Saund. 5, n. 3.

county;" (q) and they are accordingly, in fact, all summoned from the body of the county only, and no part of them, necessarily, from the hundred in which the particular place laid for venue is situate.

On the whole, then, by the joint effect of these two statutes, the venire, instead of directing the jury to be summoned from that venue which had been laid to the fact *in issue*, and from the venue of *parish, town or hamlet*, as well as county, now directs them in all cases to be summoned from the *body of the county in which the action is laid*, whether that be the county laid to the fact in issue or not, and without regard to the parish, town or hamlet.

What has been hitherto said on the subject of venue relates only to the form in which the venue is laid and its effect as to the venire. There is, however, another very important point still remaining to be considered, viz.: that which relates to the necessity of laying the venue *truly*.

§ 161. **The modern reason for the rule as to venue.**— Before the change in the constitution of juries above mentioned, the venue was of course always to be laid in the true place where the fact arose; for so the reason of the law of venue evidently required. But when, in consequence of that change, this reason ceased to operate, the law began to distinguish between cases in which the truth of the venue was material, or of the substance of the issue, and cases in which it was not so. A difference began now to be recognized between *local* and *transitory* matters. The former consisted of such facts as carried with them the idea of some certain place, comprising all matters relating to the *realty* and hardly any others; the latter consisted of such facts as might be supposed to have happened anywhere, and therefore comprised debts, contracts, and generally all matters relating to the person or personal property. With respect to the former, it was held that if any local fact were laid in pleading at a certain place, and issue were taken on that fact, the place formed part of the substance of the issue and must therefore be proved as laid, or the party would fail as for want of proof. But as to transitory facts the rule was that they might be laid as having hap-

(q) See the form of the venire, *supra*, p. 172.

pened at one place and might be proved on the trial to have occurred at another. (*r*)

The present state of the law, with respect to the necessity of laying the true venue, is accordingly as follows:

Actions are either *local* or *transitory*. An action is local if all the principal facts on which it is founded be local,¹ and transitory if any principal fact be of the transitory kind.² In a local action the plaintiff must lay the *venue in the action* truly. In a transitory one he may lay it in any county, and any parish, town or hamlet within the county that he pleases.

From this state of the law it follows, first, that if an action be local and the facts arose *out of the realm*, such action cannot be maintained in the English courts; (*s*) for as the *venue in the action* is to be laid truly, there is no county into which, consistently with that rule, the original writ can be directed.³ But, on the other hand, if the action be transitory, then, though all the facts arose abroad, the action may be maintained in this country, because the *venue in the action* may be laid in any English county, at the option of the plaintiff.

The same state of law also leads to the following inference: that in a transitory action the plaintiff may have the action tried in any county that he pleases; for, as we have seen, he may lay the *venue in the action* in any county, and, upon issue joined, the venire issues into the county where the *venue in the action* is laid.⁴ And such, accordingly, is the rule, subject only to a

(*r*) Vin. Ab., Trial (M. f); Co. Litt. 282 a. See Appendix, note (62).

(*s*) Per Buller, J., *Doulson v. Matthews*, 4 T. R. 508.

¹ *Crocker v. Marine Nat'l Bank*, 10 S. & R. 114; *Livingston v. 101 Mass. 240*, 3 Am. Rep. 336; *Jefferson*, 1 Brock. 203. If an act is done in one county which injures land in another, the venue may be in either. *Pilgrim v. Mellor*, 1 Ill. App. 448. Advantage must be taken of an error in venue when the suit should be brought in one place, but the court has jurisdiction in another, by demurrer or plea in abatement. *Drake v. Drake*, 83 Ill. 526. Venue is generally regulated by statutes.

² *McDuffee v. Portland & Rochester R. R.*, 52 N. H. 480, 18 Am. Rep. 72; *Hale v. Lawrence*, 1 Zab. 714, 47 Am. Dec. 190; *Hopkins v. Haywood*, 13 Wend. 265; *Smith v. Bull*, 17 id. 323.

³ Actions to recover real property are local. 1 Chitty, Pl. *269; 4 Term, 504. So are actions to recover damages for an injury to real property trespass *quare clausum*. *Stuman v. Colon*, 48 Ill. 463; *Brown v. Cald-*

⁴ In the United States the statutes usually provide for suing a defendant where he resides.

Whenever place is descriptive of the cause or issue upon, it
must be strictly proved.
When place is substantive, it need be only substantially proved.

§ 161.] RULES TO PRODUCE CERTAINTY IN ISSUE.

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check interposed by another regulation, viz., that which relates to the *changing of the venue*. The courts established about the reign (as it is said) of James I. (t) a practice by which defendants were enabled to protect themselves from any inconvenience they might apprehend from the venue being laid contrary to the fact, and enforce, if they pleased, a compliance with the stricter and more ancient system. (u) By this practice, when the plaintiff in a transitory action lays a false venue, the defendant is entitled to *move the court to have the venue changed*, i. e., altered to the right place; and the court, upon affidavit that the cause of action arose wholly in the county to which it is proposed to change the venue, will in most cases grant the application and oblige the plaintiff to amend his declaration in this particular, unless he, on the other hand, will undertake to give at the trial some material evidence arising in the county where the venue was laid.

Whether the action be local or transitory, every *local fact* alleged in the *writ and declaration* must still be laid with its true venue, on peril of a variance if the fact should be brought in issue; but transitory facts may be laid with any venue, at the choice of the plaintiff, though it is the usual and most proper course to lay them all with the *venue in the action*. As in the writ and declaration, so in the *plea and subsequent pleadings*, every *local fact* must be laid with its true venue under peril of variance; but with respect to *transitory ones*, the rule is that they must be laid with the *venue in the action*, (x) and even to lay the true place is in this case not allowable if it differ from that venue. Thus, in the example already supposed, of an action on a bond where the action is laid in Middlesex, if the defendant should plead a release at Oxford, this departure from the *venue in the action* would be bad, (y) though the release should really have been executed there. For as the plaintiff may, for a transitory matter, choose any venue that he likes in his writ and declaration, so upon the same principle it would have followed that the defendant might also, for a transitory matter, have chosen any venue in

(t) Knight v. Farnaby, 2 Salk. 670.

(u) See Appendix, note (68).

(x) Wright v. Ramscot, 1 Saund. 85; 2 Saund. 5, n. 2.

(y) Co. Litt. 232 b.

his plea; and thus, whoever happened to make the last affirmative allegation and therefore to lay the last venue, would have been able, prior to the alteration of practice introduced by the statute of Charles II., to draw the *venire facias* and the trial to any place that he pleased. But it was thought more reasonable and convenient that this option should rest with the plaintiff, who, having in the first instance chosen a venue, ought not to be removed from it without cause. The defendant, therefore, is obliged to follow the venue that the plaintiff has laid; and in consequence of the establishment of this rule, it seems now to be held that to transitory matters *no* venue need now be laid in pleadings subsequent to the declaration, because, with respect to every matter of this description, the original venue will be taken to be *implied*. (2) In practice, however, it is usual to lay a venue in these as well as in the declaration; and perhaps in point of strict form it is the more proper course.

Another point to be noticed on this subject of the true allegation of venue is, that when transitory matters are alleged out of their true place, it seems to be necessary that they should be laid (as the phrase is) *under a videlicet*, *i. e.*, with the prior intervention of the words "to wit," or "that is to say," for the form of which the reader may be referred to many of the past examples of pleadings in this work. The effect and object of the *videlicet* is to mark that the party does not undertake to prove the precise place. And accordingly there is some doubt whether the omission of a *videlicet* does not occasion a necessity, in the event of a traverse even of a transitory matter, of proving the place alleged. (a) On the other hand, however, it is clear that where the place is material, or, in other words, where the matter is local, the use of a *videlicet* will not prevent the necessity of proving the venue laid. This doctrine as to a *videlicet*, it will be observed, is not peculiar to venue, but applies (as will afterwards appear) to many other of the points on which certainty is required in pleading.

(2) See 1 Chitty, 517.

(a) Mr. Chitty inclines to consider the omission as immaterial. See 1 Chitty, 308, note (b). Opposed, however, to the authorities on which the learned author relies, are *Symmons v. Knox*, 3 T. R. 68; *Arnfield v. Bate*, 3 M. & S. 173; 2 Saund. 201 (c); *Bray v. Freeman*, 2 Moore, 114, 98.

The last point of remark that occurs on this subject relates to the case where a *local* matter occurring *out of the realm* is alleged in the course of the pleading. This was formerly considered as a case of difficulty; for, on the one hand, all local facts are to be alleged (as has been shown) in the true place; and on the other hand, if a place out of the realm be laid for venue and issue be joined on the fact, it was at one time supposed that the issue could not be tried, because no jury could be summoned from the place; and prior to the statute of Charles, it was by the general rule essential (as already stated) that the jury should be summoned from the venue laid to the fact in issue. (b) It was, however, early decided that notwithstanding that general rule, such matter might be tried by a jury from the *venue in the action*, and thus the difficulty was removed. (c) And by way of more effectually preventing the objection, a form has long been in use which satisfies the double object of conforming to the true place, and at the same time laying a venue within the realm; the venue of a fact arising abroad being often alleged with a *videlicet* under the following form of expression: "at Fort St. George, in the East Indies" (the real place), "*to wit*, at Westminster, in the county of Middlesex" (the *venue in the action*). (d) With respect to this formula, indeed, we may take occasion to observe that it is usually applied, not only to local facts arising out of the realm, but to those arising *in this country* also, if they happened at a different venue from that *in the action*.

RULE II.

✓ § 162. The pleadings must have certainty of time. (e) —

In personal actions the pleadings must allege the *time*, that is, the day, month and year when each traversable fact occurred; and when there is occasion to mention a continuous act, the period of its duration ought to be shown. (f)¹

(b) See a curious instance of the difficulty formerly found in such cases, cited per Abbott, C. J., *The King v. Burdett*, 4 Barn. & Ald. 172; and another instance, cited Dowdale's Case, 6 Rep. 47 b.

(c) Dowdale's Case, 6 Rep. 46 b; Calvin's Case, 7 Rep. 27 a.

(d) Com. Dig., Action (N. 7).

(e) Com. Dig., Pleader (C. 19); *Halsey v. Carpenter*, Cro. Jac. 359; *Denison v. Richardson*, 14 East, 291.

(f) *Ibid.*

¹ See *People v. Ryder*, 12 N. Y. 433; *Moxley v. Moxley*, 2 Met. (Ky.) 811; *King v. Roxborough*, 2 Tyr. 473.

The necessity of laying a time, like that of laying a venue, extends to *traversable* facts only, and therefore no time need be alleged to matter of inducement or aggravation. The courts, indeed, are in the habit of considering the allegations of place and time as connected together, and have laid down this general principle, that wherever it is necessary to lay a venue it is also necessary to mention time. (g)

As the place, in transitory matters, is considered as forming no material part of the issue, so that one place may be alleged and another proved, the same law has obtained with respect to time, in all matters generally. (h)¹ The pleader, therefore, in general, assigns any time that he pleases to a given fact. This option, however, is subject to certain restrictions. 1. He should lay the time under a *videlicet*, if he does not wish to be held to prove it strictly. (i)² 2. He should not lay a time that is *intrinsically impossible* or *inconsistent with the fact to which it relates*. A time so laid would in general be sufficient ground for demurrer. But on the other hand there is no ground for demurrer where such time is laid to a fact not traversable, or where, for any other reason, the allegation of time was unnecessarily made; for an unnecessary statement of time, though impossible or inconsistent, will do no harm, upon the principle that *utile, per inutile, non vitatur*. (k) 3. Again, there are some instances in which time happens to form a *material point in the merits of the case*; and, in these instances, if a traverse be taken the time laid is of the substance of the issue and must be strictly proved;³ just as in local matters it is necessary to prove the alleged venue. The pleader, therefore, with respect to all facts of this description

(g) Per Buller, J., *The King v. Holland*, 5 T. R. 620.

(h) Co. Litt. 283 a; *The King v. Bishop of Chester*, 2 Salk. 561; *Cooke v. Birt*, 5 Taunt. 765.

(i) As to the meaning and effect of a *videlicet*, *vide supra*, p. 332.

(k) This appears to be a correct general statement of the law with respect to demurrer for an impossible or inconsistent date; but the current of authorities is not quite clear and uniform on this subject. *Vide* Com. Dig., Pleader (C. 19). See Appendix, note (64).

¹ *Relyea v. Beaver*, 34 Barb. 547; to the materiality of time, 1 Chitty, Spencer v. Trafford, 42 Md. 1; Howland v. Davis, 40 Mich. 545. Pl. *259, and notes.

² *Videlicet* does not help material facts. Frank v. Morris, 57 Ill. 139; Ladue v. Ladue, 16 Vt. 189. See as 113; Williams v. Nesbit, 65 Ind. 171; Brown v. Harmon, 21 Barb. 508; Wellington v. Milliken, 83 Me. 58.

When the time is description of the contract, etc., such upon, it is not
thus proved.

must state the time truly, at the peril of failure as for a variance. And here, as in the case of a local fact, the insertion of a *videlicet* will give no help. Thus, where the declaration stated an usurious contract made on the 21st day of December, 1774, for giving day of payment of a certain sum to the 23d day of December, 1776, and the proof was that the contract was on the 23d December, 1774, giving day of payment for *two years*, it was held that the verdict must be for the defendant; the principle of this decision being that the time given for payment being of the substance of an usurious contract, such time must be proved as laid. (l) So where the declaration stated an usurious agreement, on the 14th of the month, to forbear and give day of payment for a certain period, but it was proved that the money was not advanced till the 16th, the plaintiff was nonsuited; (m)¹ it being

(l) *Carlisle v. Trears*, Cowp. 671.

(m) The nature of judgment of *nonsuit* has been stated in the first chapter, *supra*, p. 195. It will be proper to explain here, however, that when, on account of a variance or any other matter of form, the plaintiff understands that the judge is going to direct the jury to find a verdict against him, he usually takes the course of avoiding a verdict by voluntarily submitting to judgment of nonsuit; and for that purpose he is supposed to absent himself from the court. The reason is that such judgment does not prevent his bringing another action; but by a verdict he is barred forever. See 3 Bl. Com. 376.

¹ *Nonsuit*: When the plaintiff does not appear he should be nonsuited, and it is error to proceed to trial without him. *Nordmanser v. Hitchcock*, 40 Mo. 178. In some jurisdictions a practice obtains of directing a nonsuit without the plaintiff's consent, even though he may be present in court and after the jury have been sworn and evidence heard. See *Thompson on Trials*, § 2221 et seq. But in general the practice is a privilege extended to a plaintiff to save the effect of a judgment against him barring another action. This is called a voluntary nonsuit. *Elmore v. Grymes*, 1 Pet. 469. To bar this common-law right the whole case must have gone to the jury. *Berry v. Savage*, 2 Scam. 261. And if the jury return to the bar for instructions a nonsuit may be taken. *Hensley v. Peck*, 13 Mo. 587. Upon a judg-

ment by confession opened by order of court for a defense, a nonsuit may be taken. *Gordon v. Godell*, 34 Ill. 429. A voluntary nonsuit bars an appeal or error. *Rankin v. Curtenius*, 12 Ill. 334. In trials by the court without a jury, nonsuit may be taken after opinion is announced but before judgment is entered. *Howe v. Harroun*, 17 Ill. 494; *Wilson S. M. Co. v. Lewis*, 10 Ill. App. 191. Judgment of nonsuit is no bar. *Holmes v. C. & A. Ry.*, 94 Ill. 439; *Bates v. Jenkins, Breese* (Ill.), 411. A voluntary nonsuit and a dismissal have the same effect. *Holmes v. C. & A. Ry.*, 94 Ill. 484. A nonsuit, whether voluntary or involuntary is not a bar. *Id.*; *Central Tr. Co. v. Pullman P. C. Co.*, 139 U. S. 24; *Bournonville v. Goodall*, 10 Pa. St. 133; *Oscanyan v. Arms*, 103 U. S. 261. See 2 *Foster's Fed. Pr.* (2d ed.)

held by Lord Mansfield at the trial, and afterwards by the court in bank, that the day from whence the forbearance took place was material though laid under a *videlicet*. (n)

(n) *Johnson v. Picket*, cited *Grimwood v. Barritt*, 6 T. R. 468; *Hardy v. Cathcart*, 5 Taunt. 2.

774. note. An involuntary nonsuit may be excepted to and will be ground for error. *Id.*

Withdrawing a juror is another means by which the plaintiff may recede from the final conclusion of a cause without submitting his case for final determination. The withdrawing a juror works a continuance of the case, and is usual in cases of surprise. It should be at cost of the party asking it. It was a practice at common law, and is to be exercised under the discretion of the court. *Miller v. Metzger*, 16 Ill. 890; *Scholfield v. Settley*, 31 id. 515; *Wolcott v. Studebaker*, 34 Fed. Rep. 8.

Excluding the plaintiff's evidence is another mode of defeating the plaintiff's cause often practiced at the present time. It has the same effect as a nonsuit. *Holmes v. C. & A. Ry.*, 94 Ill. 439. It is a doubtful practice, and should only be permitted in clear cases. *Frazier v. Howe*, 106 Ill. 563. A motion to exclude, or a demurrer to the evidence, admits all facts to be true, and the existence of all other facts which might be inferred from the facts alleged. *Phillip v. Dickinson*, 85 Ill. 11.

Directing a verdict: The main difference between a nonsuit and directing a verdict lies in the fact that a verdict and judgment constitute a bar to another suit, while a nonsuit does not. *Oscanyan v. Arms Co.*, 108 U. S. 261. The practice of directing the jury to find a particular verdict is one in common use. It seems to be restricted in its use to the province of saying what verdict the jury

may not find, and not a direction that they must find for a particular party.

The direction is that the jury shall find against the party having the burden of proof. *Phillips v. Brigham*, 26 Ga. 617; *Clean v. Jones*, 7 Exch. 421; *Robinson v. Ill. Cent. Ry. Co.*, 30 Ia. 401. Where there is any evidence tending to support every material allegation, the sufficiency of such evidence is for the jury, and the court should submit to it the question as to whether such evidence is sufficient from which to find a verdict. *Groll v. Tower*, 85 Mo. 249; *House v. Wilder*, 47 Ill. 510. While it is generally held that the jury should be left to find the effect of the evidence, the rule seems to be departed from in cases of directing the jury to find for the defendant in cases where the ground of the direction is proof of the plaintiff's contributory negligence, for this is the court deciding what is contributory negligence. See Sacket on Instructions (2d ed.), 27; *Greening v. Bishop*, 39 Wis. 552; *Johnson v. Moss*, 45 Cal. 515; *Kelly v. Hendricks*, 36 Mich. 206; *Am. Ins. Co. v. Butler*, 70 Ind. 1. When the evidence is so insufficient that the court would feel bound to set a verdict aside, he should direct a verdict for the defendant. *Pullman P. C. Co. v. Laack*, 143 Ill. 243; *Tefft v. Ashbough*, 13 id. 602. Whether there is any evidence is for the court. *Poleman v. Johnson*, 84 Ill. 269. Some courts hold that if there is any evidence, though it be but a scintilla, it must be left to the jury; while others, applying the maxim *de minimis non*

Where the time needs not to be truly stated (as is generally the case), it is subject to a rule of the same nature with one that applies to venue in transitory matters, (*o*) viz.: that the plea and subsequent pleadings should follow the day alleged in the writ and declaration; (*p*) and if, in these cases, *no time at all* be laid, the omission is aided, after verdict or judgment, by confession or default, by the operation of the statute of jeofails. (*q*) But where, in the plea or subsequent pleadings, the time happens to be material, it must be alleged; and there (as in the case of a venue to a local fact) the pleader may be obliged to depart from the day in the writ and declaration.¹

Certainty of time is said to be required in *personal* actions only, it being held that in *real* and *mixed* actions it is, in general, not necessary to allege the day, month and year, and that it is sufficient to show in what king's reign the matter arose. (*r*)

RULE III.

§ 163. The pleadings must specify quality, quantity and value. (*s*) —

It is, in general, necessary where the declaration alleges any injury to *goods and chattels*, or any contract relating to them, that their *quality*, *quantity*, and *value* or *price*, should be stated. And in any action brought for *recovery* of *real property*, its *quality* should be shown, as whether it consists of houses, lands or other hereditaments; and, in general, it should be stated whether the lands be meadow, pasture or

(*o*) *Supra*, p. 331.

(*p*) 2 Saund. 5, n. 3; *Hawe v. Planner*, 1 Saund. 14.

(*q*) *Higgins v. Highfield*, 13 East, 407.

(*r*) Com. Dig., Pleader (C. 19); *The King v. Bishop of Chester*, 2 Salk. 561; *Skin. 600*; 9 Hen. 6, 115, 116.

(*s*) *Oportet quod petens rem designet, quam petit, — videlicet qualitatem, etc., — item quantitatem, etc.* Bract. 431 a; *Harpur's Case*, 11 Rep. 25 b, 55 a; Doct. Pl. 85, 86; *Knight v. Symms*, Carth. 204; *Doe v. Ploughman*, 1 East, 441; *Goodtitle v. Otway*, 8 East, 357; *Andrew v. Whitehead*, 13 East, 102.

curat lex, hold a mere scintilla to be insufficient. See *Brooks v. Somerville*, 106 Mass. 271; *McKown v. Craig*, 39 Mo. 156; *Claffin v. Meyer*, 75 N. Y. 260; *Hogan v. Cushing*, 49 Wis. 169; *May v. I. C. Ry.*, 35 Ia. 585; *Conner v. Giles*, 76 Me. 132; *Com. of Marion Co. v. Clark*, 94 U. S. 278.

¹*Germania Ins. Co. v. Lieberman*, 58 Ill. 117.

arable, etc. And the *quantity* of the lands or other real estate must also be specified. (t) So, in an action brought for *injuries* to real property, the *quality* should be shown, as whether it consists of houses, lands or other hereditaments.

Thus in an action of trespass for breaking the plaintiff's close and taking away his fish, without showing the number or nature of the fish, it was after verdict objected in arrest of judgment, first, "that it did not appear by the declaration of what nature the fish were, pikes, tenches, breams," etc.; and secondly, that "the certain number of them did not appear." And the objection was allowed by the whole court. (u). So where, in an action of trespass, the declaration charged the taking of cattle, the declaration was held to be bad because it did not show of what species the cattle were. (x) So in an action of trespass, where the plaintiff declared for taking goods generally, without specifying the particulars, a verdict being found for the plaintiff, the court arrested the judgment for the uncertainty of the declaration. (y) So (in a modern case) where, in an action of replevin, the plaintiff declared that the defendant, "in a certain dwelling-house, took divers goods and chattels of the plaintiff," without stating what the goods were, the court arrested the judgment for the uncertainty of the declaration, after judgment by default and a writ of inquiry executed. (z) So in an action of dower, where blanks were left in the count for the number of acres claimed, the judgment was reversed after verdict. (a) So in ejectment, the plaintiff declared for five closes of land, arable and pasture, called Long Furlongs, containing ten acres; upon not guilty pleaded the plaintiff had a verdict; and it was moved in arrest of judgment that the declaration was ill because the quantity and quality of the lands were not distinguished and ascertained, so as to show how many acres of arable there were and how many of pasture. And for this reason the declaration was held ill and the judgment arrested. (b)¹

(t) See the authorities last cited.

(u) *Playter's Case*, 5 Rep. 34 b.

(x) *Dale v. Phillipson*, 2 Lutw. 1374.

(y) *Bertie v. Pickering*, 4 Burr. 2455; *Wiat v. Essington, Ltd.* Ray. 1410, S. P.

(z) *Pope v. Tillman*, 7 Taunt. 642.

(a) *Lawley v. Gattacre*, Cro. Jac. 498.

(b) *Knight v. Symms*, Carth. 204. See Appendix, note (65).

¹ *O. M. Ry. v. People*, 149 Ill. 663.

With respect to *value*, it is to be observed that it should be specified in reference to the *current coin of the realm*, thus: “divers, to wit, three tables of great value, to wit, the value of twenty pounds of lawful money of Great Britain.” With respect to *quantity*, it should be specified by the ordinary measures of extent, weight or capacity, thus: “divers, to wit, fifty acres of arable land;” “divers, to wit, three bushels of wheat.”

§ 164. **Loose construction of the rule.**—The rule in question, however, is not so strictly construed but that it sometimes admits the specification of *quality* and *quantity* in a *loose and general way*. Thus, a declaration in trover for two *packs* of flax, and two *packs* of hemp, without setting out the weight or quantity of a pack, is good after verdict, and, it seems, even upon special demurrer. (c) So a declaration in trover for a *library* of books has been allowed without expressing what they were. So where the plaintiff declared in trespass for entering his house and taking *several keys* for the opening of the doors of his said house, it was objected, after verdict, that the kind and number ought to be ascertained. But it was answered and resolved that the keys are sufficiently ascertained by reference to the house. (d) So it was held, upon special demurrer, that it was sufficient to declare, in trespass for breaking and entering a house, damaging the goods and chattels, and wrenching and forcing open the doors, without specifying the goods and chattels, or the number of doors forced open; for that the essential matter of the action was the breaking and entering of the house, and the rest merely aggravation. (e)

§ 165. **Actions to which the rule is not applicable.**—There are also some *kinds of action* to which the rule requiring specification of quality, quantity and value does not apply in modern practice. Thus, in actions of *debt* and *indebitatus assumpsit* (f) (where a more general form of declaration obtains than in most other actions), if the debt is claimed in

(c) 2 Saund. 74 b, n. 1.

(d) Layton v. Grindall, 2 Salk. 643; and see many other instances, 2 Saund. 74 b, n. 1.

(e) Chamberlain v. Greenfield, 3 Wils. 202.

(f) *Indebitatus assumpsit* is that species of the action of *assumpsit* in which the plaintiff first alleges a debt and then a promise in consideration of the debt. The promise so laid is generally an implied one only. See the form of a declaration in *indebitatus assumpsit*, *supra*, p. 120.

respect of goods sold, etc., the quality, quantity or value of the goods sold is never specified. The amount of the debt or sum of money due upon such sale must, however, be shown.

§ 166. **Proof need not correspond with averment.**—As with respect to *place* and *time*, so with respect to *quantity* and *value*, it is not necessary, when these matters are brought into issue, that the proof should correspond with the averment.¹ The pleader may, in general, allege any quantity and value that he pleases (at least if it be laid under a *videlicet*), without risk from the variance in the event of a different amount being proved. (g) But it is to be observed that a *verdict cannot, in general, be obtained for a larger quantity or value than is alleged*. The pleader, therefore, takes care to lay them to an extent large enough to cover the utmost case that can be proved. And it is also to be observed that as with respect to *place* or *time*, so with respect to *quantity* or *value*, there may be instances in which it forms part of the substance of the issue, and there the amount must be strictly proved as laid.² For example, to a declaration in *assumpsit* for 10*l.* 4*s.* and other sums, the defendant pleaded as to all but 4*l.* 7*s.* 6*d.* the general issue, and as to the 4*l.* 7*s.* 6*d.* a tender. The plaintiff replied that after the cause of action accrued, and before the tender, the plaintiff *demand*ed the said sum of 4*l.* 7*s.* 6*d.*, which the defendant refused to pay; and on issue joined it was proved that the plaintiff had demanded not 4*l.* 7*s.* 6*d.*, but the whole 10*l.* 4*s.* This proof was held not to support the issue. (h)

With respect to the allegation of *quality*, this generally requires to be strictly proved as laid. (i)

(g) *Crispin v. Williamson*, 8 Taunt. 107.

(h) *Rivers v. Griffith*, 5 Barn. & Ald. 690.

(i) See Appendix, note (66).

¹ *Rubens v. Stevens*, 4 B. & Ad. 241; *Chamblee v. McKenzie*, 31 Ark. 155; 1 Greenl. Ev., § 61. the true value where, by mistake, he has alleged it incorrectly, or where the value may have changed since the allegation was made. *Reilly v. Ringland*, 39 Ia. 106; *Gregory v. Wright*, 11 Ab. Pr. 417; 1 Greenl. Ev., § 61.

² But in Iowa the question of value is one to be determined by proof. A party is not precluded from proving

RULE IV.

§ 167. The pleadings must specify the names of persons. (*k*) —

First, this rule applies to the *parties to the suit*.

The original writ and the declaration must both set forth accurately the names of both parties. (*l*)¹ The plaintiff must be described by his Christian name and surname; and if either be mistaken or omitted it is ground for a plea in abatement.² The case is the same with respect to the defendant. If either party have a name of *dignity*, such as *earl*, etc., he must be described accordingly; and an omission or mistake in such description has the same effect as in the Christian name and surname of an ordinary person. (*m*)³

Secondly, the rule relates to persons *not* parties to the suit of whom mention is made in the pleading.

The names of such persons, viz.: the Christian name and surname, or name of dignity, must in general be given; but if not within the knowledge of the party pleading, an allegation to that effect should be made, and such allegation will excuse the omission of name. (*n*)

§ 168. Effect of misnomer.— A mistake in the name of a *party to the suit* is ground for plea in abatement only,⁴ and cannot be objected as a variance at the trial; but the name of a person *not* party is a point on which the proof must correspond with the averment, under peril of a fatal variance. Thus, where a bill of exchange drawn by John *Couch* was declared upon as drawn by John *Crouch*, and the defendant pleaded

(*k*) Com. Dig., Abatement (E. 18), (E. 19), (F. 17), (F. 18); Com. Dig., Pleader (C. 18); Bract. 801 b.

(*l*) Ibid.

(*m*) Com. Dig., Abatement (E. 20), (F. 19).

(*n*) Buckley v. Rice Thomas, Plow. 128.

¹ Herf v. Shultze, 10 Ohio, 262; Jackson v. Alexander, 8 Tex. 108; Schmidt v. Thomas, 83 Ill. App. 109; Brent v. Shook, 36 Ill. 125.

² Initials of the Christian name may be used when they have been adopted and used. Kemp v. McCormick, 1 Mont. 420. See Plea in Abatement, *Misnomer*.

³ As to where one is sued in a rep-

resentative capacity, see Henshall v. Roberts, 5 East, 150; Stillwell v. Carpenter, 62 N. Y. 639; Magee v. Supervisors of Waupaca Co., 38 Wis. 247; Beers v. Shannon, 73 N. Y. 223; Beach v. King, 17 Wend. 197; Hallock v. Mixer, 16 Cal. 577.

⁴ See *supra*, Plea in Abatement, *Misnomer*.

the general issue, the plaintiff was nonsuited. (o) So, where the declaration stated that the defendant went before Richard Cavendish, Baron Waterpark, of *Waterfork*, one of the justices, etc., for the county of Stafford, and falsely charged the plaintiff with felony, etc., and upon the general issue it appeared in evidence that the charge was made before Richard Cavendish, Baron Waterpark, of *Waterpark*, this was held a fatal variance in the name of dignity. (p)

RULE V.

✓ § 169. The pleadings must show title. (q)¹—

When, in pleading, any right or authority is set up in respect of property, personal or real, some *title* to that property must, of course, be alleged in the party, or in some other person from whom he derives his authority. (r) So, if a party be charged with any *liability* in respect of property, personal or real, his *title* to that property must be alleged.

It is proposed first to consider the case of a party's alleging title *in himself, or in another whose authority he pleads*; next, that of his alleging it *in his adversary*.

§ 170. I. Of the case where a party alleges title in himself or in another whose authority he pleads—1. It is often sufficient to allege a title of possession only.—The form of laying a title of possession in respect of *goods and chattels* is either to allege that they were the “goods and chattels of the plaintiff,” or that he was “lawfully possessed of them as of his own property.” (s) With respect to *corporeal hereditaments*, the form is either to allege that the close, etc., was the “close of” the plaintiff, (t) or that he was

(o) *Whitwell v. Bennett*, 3 Bos. & Pul. 559. See, also, *Bowditch v. Mawley*, 1 Camp. 196; *Hutchinson v. Piper*, 4 Taunt. 810.

(p) *Walters v. Mace*, 2 Barn. & Ald. 756.

(q) Com. Dig., Pleader (3 M. 9; Bract. 372 b, 373 b.

(r) *Ibid*.

(s) As in the example, *supra*, pp. 121, 124.

(t) As in the example, *supra*, p. 113.

¹ *May v. Attleboro Bank*, 19 Ill. acts complained of. *Smith v. Force*, App. 604; *Malcolm v. O'Reilly*, 89 31 Minn. 119. In an action of ejectment, possession at time of suit must be shown: *Cofer v. Schening*, 96 N. Y. 156; *Smith v. Barclay*, 54 Minn. 47. The allegation of ownership should relate to the time of the Ala. 338.

"lawfully possessed of a certain close," etc. (u) With respect to *incorporeal hereditaments*, a title of possession is generally laid by alleging that the plaintiff was possessed of the corporeal thing in respect of which the right is claimed, and by reason thereof was entitled to the right at the time in question; for example, that he "was possessed of a certain messuage, etc., and by reason thereof, during all the time aforesaid, of right ought to have had common of pasture, etc." (x)

§ 171. **When a title of possession is applicable.**—A title of possession is *applicable*, that is, will be sufficiently sustained by the proof, in all cases where the interest is of a present and immediate kind. Thus, when a title of possession is alleged with respect to *goods and chattels*, the statement will be supported by proof of any kind of *present interest* in them, whether that interest be temporary and special or absolute in its nature; as, for example, whether it be that of a carrier or finder only, or that of an owner and proprietor. (y) So where a title of possession is alleged in respect of *corporeal or incorporeal hereditaments*, it will be sufficiently maintained by proving any kind of *estate in possession*, whether fee-simple, fee-tail, for life, for term of years, or otherwise. On the other hand, with respect to any kind of property, a title of possession would not be sustained in evidence by proof of an interest in *remainder or reversion* only; and therefore when the interest is of that description the preceding forms are inapplicable, and title must be laid in remainder or reversion, according to the fact, and upon the principles that will be afterwards stated on the subject of alleging title in its *full and precise extent*.

§ 172. **If title of possession is applicable the allegation thereof is often sufficient.**—Where a title of possession is *applicable* the allegation of it is in many cases *sufficient* in pleading without showing title of a superior kind. The rule on this subject is as follows: *That it is sufficient to allege possession as against a wrong-doer*, (z)¹ or, in other words, that it is

(u) See an example, 2 Chitty, 531.

(x) See an example, 2 Chitty, 354.

(y) 2 Saund. 47 a, n. 1.

(z) Com. Dig., Pleader (C. 39), (C. 41); Taylor v. Eastwood, 1 East, 212.

¹ See Trespass. See, also, Langford v. Webber, 3 Mod. 182.

enough to lay a title of possession against a person who is stated to have committed an injury to such possession, having, as far as it appears, no title himself. Thus, if the plaintiff declare in trespass for breaking and entering his close, or in trespass on the case for obstructing his right of way, it is enough to allege in the declaration in the first case that it is the "close of the plaintiff," (a) in the second case that "he was possessed of a certain messuage, etc., and by reason of such possession of right ought to have had a certain way," etc. For if the case was that the plaintiff being possessed of the close, the defendant, having himself no title, broke and entered it, or that the plaintiff being possessed of a messuage and right of way, the defendant, being without title, obstructed it, then whatever was the nature and extent of the plaintiff's title in either case, the law will give him damages for the injury to his possession; and it is the possession, therefore, only that needs to be stated. It is true that it does not yet appear that the defendant had no title, and by his plea he may possibly set up one superior to that of the plaintiff; but as, on the other hand, it does not yet appear that he *had* title, the effect is the same, and till he pleads he must be considered as a mere *wrong-doer*; that is, he must be taken to have committed an injury to the plaintiff's possession without having any right himself. Again, in an action of trespass for assault and battery, if the defendant justify on the ground that the plaintiff wrongfully entered his house and was making a disturbance there, and that the defendant gently removed him, the form of the plea is that "the defendant was lawfully possessed of a certain dwelling-house, etc., and being so possessed the said plaintiff was unlawfully in the said dwelling-house," etc.; (b) and it is not necessary for the defendant to show any title to the house beyond this of mere possession. For the *plaintiff* has at present set up no title at all to the house, and on the face of the plea he has committed an injury to the defendant's possession without having any right himself. So in an action of trespass for seizing cattle, if the defendant justify on the ground that the cattle were damage feasant on his close, it is not necessary for

(a) See the form of the declaration, *supra*, p. 118.

(b) 2 Chitty, 529.

him to show any title to his close except that of mere possession. (c)

It is to be observed, however, with respect to this rule as to alleging possession against a wrong-doer, that it seems not to hold in *replevin*. For, in that action, it is held not to be sufficient to state a title of possession, even in a case where it would be allowable in trespass by virtue of the rule above mentioned. Thus, in *replevin*, if the defendant plead that he was possessed of a messuage and entitled to common of pasture as appurtenant thereto, and that he took the cattle damage feasant, it seems that this pleading is bad, and that it is not sufficient to lay such mere title of possession in this action. (d) It is to be observed, too, that this rule has little or no application in *real* or *mixed* actions, for in these an injury to the possession is seldom alleged; the question in dispute being, for the most part, on the *right of possession* or the *right of property*.

§ 173. When not sufficient to allege possession.— Where this rule as to alleging possession against a wrong-doer does not apply, there, though the interest be present or possessory, it is, in general, not sufficient to state a title of possession, but some *superior* title must be shown. Thus, in trespass for breaking the plaintiff's close, if the defendant's justification be that the close was his own copyhold estate of inheritance, his plea, as it does not make the plaintiff a wrong-doer, but, on the contrary, admits his possessory title in the close, and pleads in confession and avoidance of it, must allege not merely a possession but a seisin in fee of the copyhold. So in a similar action, if the defendant rely on a right of way over the plaintiff's close, it will not be sufficient to plead that he, the defendant, was lawfully *possessed* of another close and by reason of such possession was entitled to a right of way over the plaintiff's, but he must set forth some superior title to his close and right of way — as, for example, that of seisin in fee of the close and a prescription in a *que estate* (e) to the

(c) 2 Saund. 285, n. 3; Anon., 2 Salk. 643; Searl v. Bunnion, 2 Mod. 70; Langford v. Webber, 3 Mod. 132.

(d) Hawkins v. Secles, 2 Bos. & Pul. 359, 361, n. a.; 2 Saund. 285, n. 3; Saunders v. Hussey, 2 Lut. 1331; Carth. 9; 1 Lord Raym. 832, S. C.; 1 Saund. 347 b, n. 3.

(e) As to prescription in a *que estate*, see 2 Bl. Com. 264.

right of way. (*f*) With respect to the manner of stating a superior title to that of possession, it will be shown under the following head relative to the allegation of title in its *full and precise extent*.

§ 174. When the title must be alleged in its full extent.

2. Where a *title of possession* is, upon the principles above explained, either not applicable or not sufficient, the title should in general be stated in its *full and precise extent*.

Upon this head two subjects of remark present themselves — the *allegation of the title itself* and the *statement of its derivation*.

With respect to the *allegation of the title itself*, there are certain forms used in pleading appropriate to each different kind of title, according to all the different distinctions as to *tenure, quantity of estate, time of enjoyment, and number of owners*. (*g*) These forms are too various to be here stated; and it will be sufficient to refer the reader to the copious stores in the printed precedents. (*h*)¹

§ 175. With respect to the derivation of the title, there are certain rules of which it will be necessary to give some account.

There is a leading distinction on this subject between *estates in fee-simple* and *particular estates*.

In general, it is sufficient to state a *seisin in fee-simple*, — *per se*; that is, simply to state (according to the usual form of alleging that title) that the party was “seised in his demesne as of fee of and in a certain messuage,” etc., (*i*) without showing the *derivation*, or (as it is expressed in pleading) the *commencement* of the estate. (*k*) For if it were requisite to show from whom the present tenant derived his title, it might be required, on the same principles, to show from whom that person derived *his*, and so *ad infinitum*. Besides, as mere seisin will be sufficient to give an estate in fee-simple, the estate may, for anything that appears, have had no other commencement than the seisin itself, which is alleged. So,

(*f*) See the form, 2 Chitty, 573.

(*g*) Vide 2 Bl. Com. 103; 2 Chitty, 190-212.

(*h*) See 2 Chitty, *ibid*.

(*i*) As in the examples *supra*, pp. 103, 243.

(*k*) Co. Litt. 303 b; Savage v. Hawkins, Cro. Car. 571.

¹ See the title of the various forms of action in notes.

though the fee be *conditional* or *determinable* on a certain event, yet a seisin in fee may be alleged, without showing the commencement of the estate. (*l*)

However, it *is* sometimes necessary to show the derivation of the fee, viz., where, in the pleading, the seisin has already been alleged in another person from whom the present party claims. In such case it must of course be shown how it passed from one of these persons to the other. Thus, in debt or covenant brought on an indenture of lease by the heir of the lessor, the plaintiff, having alleged that his ancestor was seised in fee and made the lease, must proceed to show how the fee passed to himself, viz., by descent. (*m*) So if, in trespass, the defendant plead that E. F., being seised in fee, demised to G. H., under whose command the defendant justifies the trespass on the land (giving color); and the plaintiff in his replication admits E. F.'s seisin, but sets up a subsequent title in himself to the same land, in fee-simple, prior to the alleged demise, he must show the derivation of the fee from E. F. to himself by conveyance antecedent to the lease under which G. H. claims. (*n*)

§ 176. With respect to particular estates, the general rule is that the commencement of particular estates must be shown. (*o*) If, therefore, a party sets up in his own favor an estate tail, an estate for life, a term of years, or a tenancy at will, he must show the derivation of that title from its commencement, that is, from the last seisin in fee-simple; and if derived by alienation or conveyance, the substance and effect of such conveyance should be precisely set forth. For examples of the manner of thus showing the commencement of particular estates, under all the different kinds of conveyances, and other *media* of title, the reader must again have recourse to the books of precedents. (*p*)

Under this rule, *that the commencement of particular estates must be shown*, it is necessary to show the commencement of

(*l*) Doct. Pl. 287.

(*m*) As in the example *supra*, p. 243.

(*n*) See Upper Bench Precedents, 196, cited 9 Went. : Index, xi, xli.

(*o*) Co. Litt. 308 b; Scilly v. Dally, 2 Salk. 568; Carth. 444, S. C.; Searl v. Bunnion, 2 Mod. 70; Johns v. Whitley, 3 Wils. 72; Hendy v. Stephenson, 10 East, 60; East. Ent. 656.

(*p*) See 2 Chitty, 213-232.

a *copyhold*, even though it be copyhold of *inheritance*. (q) This is on the ground that a copyhold, even in fee, is in the nature of a particular estate in respect of the freehold inheritance in the lord. And the difficulty that would arise, if the title were to be deduced from the earliest or original grantee, is obviated by the practice of going back to the admittance of the last heir or surrenderee only; which admittance is considered as in the nature of a grant from the lord, and is so pleaded. (r) It is in this manner that the commencement of a copyhold estate is in general alleged, namely, by stating it as a grant from the lord; but where an estate has been already laid in another copyholder, from whom the present party claims, and it becomes necessary, therefore, to show how the estate passed from one to the other, the conveyances by surrender between the copyhold tenants and the admittance by the lord, etc., must then be set forth according to the fact. (s)

To the rule that the commencement of particular estates must be shown there is this exception: that it need not be shown where the title is alleged by way of *inducement* only. (t) Thus if an action of debt or covenant be brought on an indenture of lease by the executor or assignee of a lessor who had been entitled for a term of years, it is necessary in the declaration to state the title of the lessor, in order to show that the plaintiff is entitled to maintain the action as his representative or assignee. But as the title is in that case alleged by way of inducement only (the action being mainly founded on the lease itself), the particular estate for years may be alleged in the lessor, without showing its commencement.

§ 177. Additional rules on derivation of title.—On the subject of the *derivation of title*, the following additional rules may be collected from the books:

First, *where a party claims by inheritance he must, in general, show how he is heir*, viz., as son or otherwise; (u) *and if he claims by mediate, not immediate, descent, he must show the*

(q) *Fyster v. Hemling*, Cro. Jac. 103; *Shepherd's Case*, Cro. Car. 190; *Robinson v. Smith*, 4 Mod. 346.

(r) See same cases, and *Brown's Case*, 4 Rep. 22 b; *Bac. Ab.*, Pleas, etc., p. 422, 5th ed.

(s) See the forms, 2 Chitty, 205, 229.

(t) *Com. Dig.*, Pleader (E. 19.), (C. 43); *Blockley v. Slater*, Lutw. 120; *Searl v. Bannion*, 2 Mod. 70; *Scilly v. Dally*, Carth. 444.

(u) *Denham v. Stephenson*, 1 Salk. 355; *Duke of Newcastle v. Wright*, 1 Lev. 120; 1 Lord Raym. 302. See the example *supra*, p. 243.

pedigree; for example, if he claims as nephew, he must show how nephew. (x)

Secondly, *where a party claims by conveyance or alienation, the nature of the conveyance or alienation must, in general, be stated*, as whether it be by devise, feoffment, etc. (y)

Thirdly, *the nature of the conveyance or alienation should be stated according to its legal effect rather than its form of words*. This depends on a more general rule, which we shall have occasion to consider in another place, viz., "that things are to be pleaded according to their legal effect or operation." For the present the doctrine, as applicable to conveyances, may be thus illustrated. In pleading a conveyance for life, with livery of seisin, the proper form is to allege it as a "demise" for life, (z) for such is its effect in proper legal description. So, a conveyance in *tail*, with livery, is always pleaded (on the same principle) as a "gift" in tail; (a) and a conveyance of the fee, with livery, is described by the term "enfeoffed." (b) And such would be the form of pleading, whatever might be the *words* of donation used in the instrument itself; which, in all the three cases, are often the same, viz., those of "give" and "grant." (c) So, in a conveyance by lease and release, though the words of the deed of release be "grant, bargain, sell, alien, release and confirm," yet it should be pleaded as a *release* only, for that is the legal effect. (d)

Fourthly, *where the nature of the conveyance is such that it would, at common law, be valid without deed or writing, there no deed or writing need be alleged in the pleading, though such document may in fact exist; but where the nature of the conveyance requires, at common law, a deed or other written instrument, such instrument must be alleged*. (e) Therefore a conveyance, with livery of seisin, either in fee, tail, or for life, is

(x) *Dumsey v. Hughes*, 3 Bos. & Pul. 453; *Blackborough v. Davis*, 12 Mod. 619.

(y) See Com. Dig., Pleader (E. 23), (E. 24).

(z) Rast. Ent. 647 a, 11 d.

(a) See Co. Ent., tit. Formedon, etc., etc.

(b) Upper Bench Prec. 196. See 2 Chitty, §14. "Feoffment properly betokeneth a conveyance in fee, and yet, sometimes improperly, it is called a feoffment when an estate of freehold only doth pass." Co. Litt. 9 a. *Feoffare* dicitur, qui feodum simplex, feoffatorio confert; *donare*, qui feodum talliatum. Spelm. Gloss., verbo *Feoffare*. And Lord Coke, in another place, makes the distinction laid down in the text between *feoffment*, *gift* and *demise*. 8 Rep. 82, b.

(c) "Do or dedi is the aptest word of feoffment." Co. Litt. 9 a.

(d) 2 Chitty, 220 note (i); 1 Arch. 127; 3 Went. 483, 515.

(e) Vin. Ab., Facts or Deeds (M. a, 11).

pleaded without alleging any charter or other writing of feoffment, gift or demise, whether such instrument in fact accompanied the conveyance or not. For such conveyance might, at common law, be made by parol only; (*f*) and though, by the statute of frauds (29 Car. II., ch. 3, sec. 1), it will not now be valid unless made in writing, yet the form of *pleading* remains the same as before the act of parliament. (*g*) 'On the other hand, a *devise* of lands (which at common law was not valid, and authorized only by the statutes 32 Hen. 8, ch. 1, and 34 Hen. 8, ch. 5) must be alleged to have been made in writing (*h*) — which is the only form in which the statutes authorize it to be made. So, if a conveyance by way of *grant* be pleaded, a deed must be alleged; (*i*)¹ for matters that "lie in grant" (according to the legal phrase) can pass by deed only. (*k*).

There is one case, however, in which a deed is usually alleged in pleading, though not necessary at common law to the conveyance, and which, therefore, in practice at least, forms an exception to the above rule. For in making title under a lease for years by indenture, it is usual to plead the indenture, (*l*) though the lease was good at common law, by parol, and needs to be in writing only where the term is of more than three years' duration, and then only by the statute of frauds.

There is also another excepted case, in which (on the other hand) it is *not* necessary to allege a deed, though the common law require one. For in pleading a demise by *husband and wife*, it is not necessary to show that it was by deed; and yet, both by common law and by statute, such demise can be by deed only. (*m*)

Thus far with respect to the allegation of title in its *full and precise extent*. Another mode, however, of laying title, still remains to be considered.

(*f*) Vin. Ab., Feoffment (Y.); Co. Litt. 121 b.

(*g*) This depends upon a more general rule, which will be noticed hereafter in its proper place.

(*h*) 1 Saund. 276 a, n. 2.

(*i*) Porter v. Gray, Cro. Eliz. 245; 1 Saund. 284, n. 2.

(*k*) Vin. Ab., tit. Grants (G. a).

(*l*) See the example, 2 Chitty, 555.

(*m*) 2 Saund. 180 b; Wiscot's Case, 2 Rep. 61 b; Dyer, 91 b; Bateman v. Allen, Cro. Eliz. 438; Childs v. Wescott, id. 432.

¹ Lathbury v. Arnold, 1 Bing. 217.

✓ § 178. *Plea of liberum tenementum.*—3. Where a *title of possession* is inapplicable or insufficient, it is not always necessary to allege the title in its *full and precise extent*; for in lieu of this it is occasionally sufficient to allege what may be called a *general freehold title*. In a plea in trespass *quare clausum fregit*, or an avowry in replevin, (n) if the defendant claim an estate of freehold in the *locus in quo*, he is allowed to plead generally that the place is his "*close, soil and freehold*." This is called the plea or avowry of *liberum tenementum*, and it may be convenient here to give the form of it.

PLEA

Of Liberum Tenementum.

In trespass quare clausum fregit.

And for a farther plea in this behalf, as to the breaking and entering the said close, in which, etc., in the said declaration mentioned, and with feet in walking, treading down, trampling upon, consuming and spoiling the grass and herbage then and there growing, the said C. D., by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said A. B. ought not to have or maintain his aforesaid action thereof against him; because he says that the said close in the said declaration mentioned, and in which, etc., now is and at the said several times when, etc., was the close, soil and freehold of him, the said C. D. Wherefore he, the said C. D., at the said several times when, etc., broke and entered the said close, in which, etc., and with feet in walking, trod down, trampled upon, consumed and spoiled the grass and herbage then and there growing, as he lawfully might for the cause aforesaid, which are the same trespasses in the introductory part of this plea mentioned, and whereof the said A. B. hath above complained. And this the said C. D. is ready to verify. Wherefore he prays judgment if the said A. B. ought to have or maintain his aforesaid action thereof against him. (o)

This allegation of a *general freehold title* will be sustained by proof of *any* estate of *freehold*, whether in fee, in tail, or for life only, and whether in possession or expectant on the determination of a term of years. (p) But it does not apply

(n) 1 Saund. 347 d, n. 6.

(o) 2 Chitty. 551.

(p) See 5 Hen. 7, 10 a, pl. 2, which shows that where there is a lease for years, it must be replied in confession and avoidance, and is no ground for traversing the plea of *liberum tenementum*.

to the case of a freehold estate in remainder or reversion expectant on a particular estate of freehold, nor to copyhold tenure.

The plea or avowry of *liberum tenementum* is the only case of usual occurrence in modern practice in which the allegation of a *general freehold title* in lieu of a *precise* allegation of title is sufficient. (g)¹

In alleging a general freehold title it is not necessary, as appears by the above example, to *show its commencement*.

§ 179. Where a party alleges title in his adversary.—

II. Having discussed the case where a party alleges title in himself or some other whose authority he pleads, next is to be considered the case where a party alleges title in his adversary.

The rule on this subject appears, in general, to be that it is not necessary to allege title more precisely than is sufficient to show a liability in the party charged. Except as far as this object may require, a party is not compellable to show the precise estate which his adversary holds, and out of which his liability arises; even in a case where, if the same person were pleading his own title, such precise allegation would be necessary. The reason of this difference is that a party must be presumed to be ignorant of the particulars of his adversary's title, though he is bound to know his own. (r)

To answer the purpose of showing a liability in the party charged, according to the rule here given, it is, in most cases, sufficient to allege a *title of possession*, the forms of which are similar to those in which the same kind of title is alleged in favor of the party pleading.

A title of possession, however, cannot be sustained in evidence except by proving some *present interest* in chattels, or

(g) See 1 Saund. 247 d, n. 6. This form of allegation occurred, however, in the now disused actions of assise, the count or plaint in which lays only a general freehold title, Dock. Pl. 289.

(r) Rider v. Smith, 3 T. R. 766; Derisby v. Custance, 4 T. R. 77; Attorney-General v. Meller, Hardr. 459.

¹ Roberts v. Taylor, 1 M., G. & S. brook, 5 T. B. Mon. 531, 17 Am. Dec. 126; Fort Dearborn Lodge v. Klein, 98; Tribble v. Frame, 7 J. J. Marsh. 115 Ill. 177; Elson v. Comstock, 150 590, 23 Am. Dec. 439; Wilson v. ad. 303; Floyd v. Ricks, 14 Ark. 286, Bibb, 25 Am. Dec. 118, 58 Am. Dec. 374; Crockett v. Lash-

actual possession of land. (s) If, therefore, the interest be by way of reversion or remainder, it must be laid accordingly, and the title of possession is *inapplicable*. So there are cases in which, to charge a party with mere possession, would not be *sufficient* to show his liability. Thus, in declaring against him, in debt for rent, as assignee of a term of years, it would not be sufficient to show that he was possessed, but it must be shown that he was possessed as assignee of the term.

§ 180. **Title of an adversary need not be alleged with great precision.**—Where a title of possession is thus inapplicable or insufficient, and some other or superior title must be shown, it is yet not necessary to allege the title of an adversary with as much precision as in the case where a party is stating his own; (t) and it seems sufficient that it be laid fully enough to show the liability charged. Therefore, though it seems, in general, to be the rule, with respect to the title of an adversary, as well as a man's own title, *that the commencement of particular estates should be shown*, (u) unless alleged by way of *inducement*, (x) yet it is not necessary to show so *precisely* the derivation of that particular estate to the party. Thus, in debt, where the defendant is charged for rent, as assignee of the term, after several mesne assignments, it is sufficient, after stating the original demise, to allege that “after making the said indenture, and during the term thereby granted, to wit, on the — day of —, in the year —, at —, all the estate and interest of the said E. F.” (the original lessee) “of and in the said demised premises, by assignment, came to and vested in the said C. D.,” without further showing the nature of the mesne assignments. (y) But if the case be reversed, that is, if the plaintiff, claiming as assignee of the reversion, sue the lessee for rent, he must precisely show the conveyances or other *media* of title by which he became entitled to the reversion; and to say, generally, that it came by assignment, will not, in this case, be sufficient without circumstantially alleging all the mesne assignments. (z)

(s) *Vide supra*, pp. 343, 344.

(t) Com. Dig., Pleader (C. 42).

(u) *Vide supra*, p. 346.

(x) *Vide supra*, p. 348.

(y) 1 Saund. 112, note 1; Attorney-Gen. v. Meller, Hardr. 459; Duke of Newcastle v. Wright, 1 Lev. 190; Derisby v. Custance, 4 T. R. 77; 2 Chitty, 196.

(z) 1 Saund. 112, note 1; Pitt v. Russell, 3 Lev. 19.

Upon the same principle, if title be laid in an adversary by descent, as, for example, where an action of debt is brought against an heir on the bond of his ancestor, it is sufficient to charge him as *heir*, without showing *how* he is heir, viz.: as son or otherwise; (a) but if a party entitle *himself* by inheritance, we have seen that the mode of descent must be alleged. (b)

§ 181. On issue the title alleged must be strictly proved. The manner of showing title, both where it is laid in the party himself or the person whose authority he pleads, and where it is laid in his adversary, having been now considered, it may next be observed that the title so shown must, in general, when issue is taken upon it, be strictly *proved*. With respect to the allegations of *place, time, quantity* and *value*, it has been shown that, when issue is taken upon them, they, in most cases, do not require to be proved as laid, at least if laid under a *videlicet*. But with respect to *title*, it is, in general, of the substance of the issue; and therefore, according to the general principle stated in the first chapter of this work, (c) requires to be maintained accurately by the proof. Thus, in an action on the case, the plaintiff alleged in his declaration that he demised a house to the defendant for seven years, and that during the term the defendant so negligently kept his fire that the house was burned down; and the defendant having pleaded *non demisit modo et forma*, it appeared in evidence that the plaintiff had demised to the defendant several tenements, of which the house in question was one; but that, with respect to this house, it was, by an exception in the lease, demised at will only. The court held that though the plaintiff might have declared against the defendant as tenant at will only, and the action would have lain, yet, having stated a demise for seven years, the proof of a lease at will was a variance, and *that* in substance, not in form only; and, on the ground of such variance, judgment was given for the defendant. (d)

§ 182. Title need not be shown where the opposite party is estopped from denying it.—The rule which requires that title should be shown having been now explained, it only remains

(a) *Denbam v. Stephenson*, 1 Salk. 355.

(b) *Vide supra*, p. 248.

(c) *Supra*, p. 175; *et vide supra*, p. 261.

(d) *Cudlip v. Rundle*, Carth. 202.

to notice an exception to which it is subject. This exception is that no title need be shown where the opposite party is *estopped* from denying the title. Thus, in an action for goods sold and delivered, it is unnecessary, in addition to the allegation that the plaintiff sold and delivered them to the defendant, to state that they were the goods *of the plaintiff*; (e) for a buyer who has accepted and enjoyed the goods cannot dispute the title of the seller. So in debt or covenant brought by the lessor against the lessee on the covenants of the lease, the plaintiff need allege no title to the premises demised, because a tenant is estopped from denying his landlord's title. On the other hand, however, a tenant is not bound to admit title to any extent greater than might authorize the lease, and, therefore, if the action be brought not by the lessor himself, but by his heir, executor or other representative or assignee, the title of the former must be alleged, in order to show that the reversion is now legally vested in the plaintiff in the character in which he sues. Thus, if he sue as heir, he must allege that the lessor was seised in fee, for the tenant is not bound to admit that he was seised in fee; and, unless he was so, the plaintiff cannot claim as heir.

RULE VI.

§ 183. The pleadings must show authority. (f) —

In general, when a party has occasion to justify under a writ, warrant, precept or any other authority whatever, he must set it forth particularly in his pleading.

Thus, in trespass for taking a mare, the defendant pleaded that Sir J. S. was seized in fee of the manor of B., and that he, and all those whose estate he had in the said manor, had always held a lawful court twice a year, to which the tenants of the manor used to resort; that such as had right of common were appointed by the steward to be of the jury; that by-laws were accustomed to be made there, and that such as had right of common obeyed those laws or paid a forfeiture of a reasonable sum to be imposed on them; that at one of these courts a jury was sworn and a law made that every person who had common should pay forty shillings for depast-

(e) B. N. P. 189.

(f) "Regularly, whensoever a man doth anything by force of a warrant or authority, he must plead it." Co. Litt. 283 a; Ibid. 308 b; Com. Dig., Pleader (E. 17); 1 Saund. 298, n. 1; Lamb v. Mills, 4 Mod. 377; Matthews v. Cary, 3 Mod. 137.

uring his cattle on any place where corn was standing; that the plaintiff had right of common, and permitted his sheep to depasture on certain ground on which corn was standing; that such offense was presented at the next court; and that the defendant, *being bailiff of the lord of the said manor*, did take the mare for the forfeiture, etc. Upon demurrer the court held the plea bad; "for the bailiff cannot take a forfeiture *ex officio*. There must be a precept directed to him for that purpose, which he must show in the pleading," etc. And judgment was given for the plaintiff. (g)¹

However, in replevin, when the defendant makes cognizance, confessing the taking of the goods and chattels as bailiff of another person for rent in arrear, or as damage feasant, it is sufficient to say generally that, "as bailiff of the said E. F., he well acknowledges the taking, etc., as for and in the name of a distress," etc., without showing any warrant or authority for that purpose. (h)

The allegation of *authority*, like that of *title*, must in general be strictly proved as laid.²

The above-mentioned particulars of *place, time, quality, quantity, and value, names of persons, title, and authority*, though in this work made the subjects of distinct rules, in a view to convenient classification and arrangement, are to be considered but as examples of that infinite variety of circumstances which it may become necessary, in different cases and forms of action, to particularize for the sake of producing a certain issue; for it may be laid down as a comprehensive rule that —

RULE VII.

— § 184. In general, whatever is alleged in pleading, must be alleged with certainty. (i)³—

This rule, being very wide in its terms, it will be proper to illustrate it by a variety of examples.

(g) *Lamb v. Mills*, 4 Mod. 377.

(h) *Matthews v. Cary*, 3 Mod. 138.

(i) Com. Dig., Pleader (C. 17), (C. 23), (E. 5), (F. 17).

¹ *Von Kittler v. Johnson*, 57 Ill. 109;

Taylor v. Doremus, 16 N. J. L. 478;

Whitney v. Shufelt, 1 Den. 594; *Collett v. Keath*, 2 East, 260.

² *Ingraham v. Edwards*, 64 Ill. 526.

³ Each pleading should be sufficiently certain to apprise the opposite party of what he is required to meet

In an action of debt on a bond conditioned for performance of covenants, if the defendant pleads generally that he performed the covenants according to the condition, the plaintiff cannot in his replication tender issue with a mere traverse of the words of the plea, viz.: that the defendant did not perform any of the covenants, etc., for this issue would be too wide and uncertain; but the replication in such case must *assign a breach*, showing specifically in what particular and in what manner the covenants have been broken. (*k*)

In debt on bond the defendant pleaded that the instrument was executed in pursuance of a certain corrupt contract made at a time and place specified between the plaintiff and defendant, whereupon there was reserved above the rate of £5 for the forbearing of £100 for a year, contrary to the statute in such case made and provided. To this plea there was a demurrer assigning for cause that the particulars of the contract were not specified, nor the time of forbearance, nor the sum to be forborne, nor the sum to be paid for such forbearance. And the court held that the plea was bad for not setting forth particularly the corrupt contract and the usurious interest; and Bayley, J., observed that he "had always understood that the party who pleads a contract must set it out if he be a party to the contract." (*l*)

To an action on the case for a libel imputing that the plaintiff was connected with swindlers and common informers, and had also been guilty of deceiving and defrauding divers persons, the defendant pleaded that the plaintiff had been illegally, fraudulently and dishonestly concerned with, and was one of, a gang of swindlers and common informers,

(*k*) *Flower v. Ross*, 5 Taunt. 386. Per Lord Mansfield, *Sayre v. Binns*, Cowp. 578; Com. Dig., Pleader (F. 14).

(*l*) *Hill v. Montagu*, 3 M. & S. 377; *Hinton v. Roffey*, 3 Mod. 35, S. P.

on the trial, and the court of the issue presented. *O. & M. R. R. Co. v. People*, 149 Ill. 663; *Chicago & Alton R. R. Co. v. Howard*, 88 id. 416. See *Anson v. Stuart*, 2 Sm. L. C. 987; *Manning v. Haas*, 5 Colo. 87; *O. M. R. Co. v. Van Gilder*, 149 Ill. 663. In New York it is provided by the code that when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made more definite and certain. *People v. Ryder*, 12 N. Y. 433.

and had also been guilty of deceiving and defrauding divers persons with whom he had had dealings and transactions. To this plea there was a special demurrer, assigning for cause, *inter alia*, that the plea did not state the *particular instances of fraud*; and though the court of common pleas gave judgment for the defendant, this judgment was afterwards reversed upon writ of error, and the plea adjudged to be insufficient on the ground above mentioned. (m)

In an action of trespass for false imprisonment the defendants pleaded that before the said time when, etc., certain persons unknown had forged receipts on certain forged dividend warrants, and received the money purporting to be due thereon in Bank of England notes, among which was a note for £100, which was afterwards exchanged at the bank for other notes, amongst which was one for £10, the date and number of which were afterwards altered; that afterwards, and a little before the said time when, etc., the plaintiff was *suspiciously* possessed of the altered note, and did in a *suspicious* manner dispose of the same to one A. B., and afterwards in a *suspicious* manner left England and went to Scotland; whereupon the defendants had *reasonable cause to suspect*, and did suspect, that the plaintiff had forged the said receipts; and so proceeded to justify the taking and detaining his person, to be dealt with according to law. Upon general demurrer this plea was considered as clearly bad, because it did not show the *grounds* of suspicion with sufficient certainty to enable the court to judge of their sufficiency; and it was held that the use of the word *suspiciously* would not compensate that omission. (n)

In an action of debt on a bond conditioned to save the plaintiff harmless from such a bail in such an action, the defendant pleaded *quod libere et absolute exoneravit* the plaintiff of the said bail. And upon demurrer it was adjudged for the plaintiff; "for always, when one pleads a discharge, and that he saved him harmless, he ought to show *how*, that the court might adjudge thereof." (o)

In *assumpsit* the plaintiff declared that whereas he bought

(m) *l'Anson v. Stuart*, 1 T. R. 743.

(n) *Mure v. Kaye*, 4 Taunt. 34.

(o) *Cro. Jac.* 303; *et vide* *Ibid.* 508; *Cro. Eliz.* 916; 1 *Saund.* 117, n. 1.

of the defendant a horse for 22*s.*, and 11*l.* more to be paid at the death or marriage of the plaintiff, for which he should become bound, with a sufficient surety, by their writing obligatory; the defendant, in consideration thereof, promised to deliver the horse when required; and that afterwards the plaintiff *offered to become bound* to the defendant, with a sufficient surety, for the payment of the said 11*l.* as aforesaid, but yet the defendant had not delivered the horse, though required so to do. The court held that the declaration was bad because he did not aver that he offered a bond *sealed*, etc., nor set down the *sum* in which he was to be bound to secure the said 11*l.*, nor *name the surety*. (*p*)

In an action of trover for taking a ship the defendant pleaded that he was captain of a certain man-of-war, and that he seized the ship mentioned in the declaration as prize; that he carried her to a certain port in the East Indies; and that the admiralty court there gave sentence against the said ship as prize. Upon demurrer it was resolved that it was necessary for the plea to show some special cause for which the ship became a prize; and that the defendant ought to show who was the judge that gave sentence, and to whom that court of admiralty did belong. And for the omission of these matters the plea was adjudged insufficient. (*q*)

In an action of debt on bond conditioned to pay so much money yearly while certain letters patent were in force, the defendant pleaded that from such a time to such a time he did pay; and that then the letters patent became void and of no force. On demurrer to the replication, the court adjudged that the plea was bad, because it did not show *how* the letters patent became void. (*r*)

In an action of debt on a bond conditioned to pay the plaintiff, when he should come to his full age, all such legacies as had been given him in a certain will, the defendant pleaded that he did at that time pay all such legacies, without showing the day and year, etc., when they were paid, nor what the legacies were. And it was held clearly "that he ought to have shown this in certain in his plea what he had paid, and

(*p*) Hob. 60, 77. This was *after verdict*; but *qu.* if the faults would not now be considered as *aided after verdict*.

(*q*) Carth. 31.

(*r*) *Lewis v. Preston*, 1 Show. 200; *Skinn.* 303, S. C.

also the time of payment, when this was, and also the time when he came to his full age." (s)

Where the defendant justified a taking on the ground of a contempt committed *tam factis quam verbis*, the plea was held bad upon demurrer, because it set forth the contempt in this general way without showing its nature more particularly. (t)

In an action of debt on bond conditioned to prove a debt paid, a plea of performance, alleging that A. and B. proved it, was held bad upon demurrer, because it did not show *how* the proof was made. (u)

§ 185. On issue the allegation must be proved as laid.—With respect to all points on which certainty of allegation is required, it may be remarked in general that the allegation, when brought into issue, requires to be proved in substance as laid; and that the relaxation from the ordinary rule on this subject, which is allowed with respect to *place, time, quantity* and *value*, does not, generally speaking, extend to other particulars.

Such are the principal rules which tend to certainty; but it is to be observed that these receive considerable *limitation* and *restriction* from some other rules of a subordinate kind, to the examination of which it will now be proper to proceed.

§ 186. 1. It is not necessary in pleading to state that which is merely matter of evidence. (x)¹—In other words, it is not necessary, in alleging a fact, to state such circumstances as merely tend to prove the truth of the fact. This

(s) 1 Bulst. 43.

(t) Collett v. Bailiffs of Shrewsbury, 2 Leo. 34.

(u) Benl. 65.

(x) "Evidence shall never be pleaded because it tends to prove matter in fact; and therefore the matter in fact shall be pleaded." Dowman's Case, 9 Rep. 9 b; and see 9 Ed. 3, 5 b, 6 a, there cited; Eaton v. Southby, Willes, 181; Jedmy v. Jenny, Raym. 8.

¹ Church v. Gilman, 15 Wend. 656, 15 Cal. 414, 76 Am. Dec. 492; Morrison v. Insurance Co., 5 Am. St. Rep. 30 Am. Dec. 82; Fidler v. Delavan, 20 Wend. 58; Hyatt v. McMahon, 25 Barb. 457; Aultman & Co. v. Seglinger, 2 S. Dak. 442; Clark v. Linberger, 44 Ind. 223; Louisville Canal Co. v. Murphy, 9 Bush, 527; Grant v. Bell, 87 N. C. 41; Green v. Palmer, 53 Minn. 174.

rule may be illustrated by the following case: In an action of replevin for seventy cocks of wheat, the defendant avowed under a distress for rent arrear. The plaintiff pleaded in bar, that before the said time when, etc., one H. L. had recovered judgment against G. S., and sued out execution; that G. S. was tenant at will to the defendant, and had sown seven acres of the premises with wheat, and died possessed thereof as tenant at will; that after his death the sheriff took the said wheat in execution and sold it to the plaintiff; that the plaintiff suffered the wheat to grow on the *locus in quo* till it was ripe and fit to cut; that he afterwards cut it and made it into cocks, whereof the said seventy cocks were parcel; that the said cocks being so cut, the plaintiff suffered the same to lie on the said seven acres until the same, in the course of husbandry, were fit to be carried away; and that while they were so lying, the defendant, of his own wrong, took and distrained the same under pretense of a distress, the said wheat not then being fit to be carried away, according to the course of husbandry, etc. The defendant demurred; and, among other objections, urged that it ought to have been particularly shown how long the wheat remained on the land after the cutting, that the court might judge whether it were a reasonable time or not. But the court decided against the objection. "For though it is said, in Co. Litt. 56 b, that in some cases the court must judge whether a thing be reasonable or not, as in case of a reasonable fine, a reasonable notice, or the like, it is absurd to say that, in the present case, the court must judge of the reasonableness; for, if so, it ought to have been set forth in the plea, not only how long the corn lay on the ground, but likewise what sort of weather there was during that time, and many other incidents, which would be ridiculous to be inserted in a plea. We are of opinion, therefore, that this matter is sufficiently averred, and that the defendant might have traversed it if he had pleased, and then it would have come before a jury, who, upon hearing the evidence, would have been the proper judges of it." (y)

The reason of this rule is evident if we revert to the general object which all the rules tending to certainty contemplate, viz., the attainment of a certain issue. This implies (as

(y) *Eaton v. Southby*, Willes, 131.

has been shown) a development of the question in controversy in a specific shape; and the *degree* of specification with which this should be developed it has been elsewhere attempted, in a general way, to define.⁽²⁾ But, so that that object be attained, there is, in general, no necessity for farther minuteness in the pleading; and therefore, those subordinate facts which go to make up the evidence by which the affirmative or negative of the issue is to be established do not require to be alleged, and may be brought forward for the first time at the trial, when the issue comes to be decided. Thus, in the above example, if we suppose issue joined, whether the wheat cut was afterwards suffered to lie on the ground a reasonable time or not, there would have been sufficient certainty, without showing on the pleadings any of those circumstances (such as the number of days, the state of the weather, etc.) which ought to enter into the consideration of that question. These circumstances, being matter of evidence only, ought to be proved before the jury, but need not appear on the record.

This is a rule so elementary in its kind and so well observed in practice as not to have become frequently the subject of illustration by decided cases; and (for that reason, probably) is little, if at all, noticed in the digests and treatises. It is, however, a rule of great importance, from the influence which it has on the general character of English pleading; and it is this, perhaps, more than any other principle of the science, which tends to prevent that minuteness and prolixity of detail in which the allegations, under other systems of judicature, are involved.

§ 187. Again: 2. It is not necessary to state matter of which the court takes notice *ex officio*. (a)¹— Therefore it is unnecessary to state *matter of law*; (b) for this the judges are

(2) See *supra*, p. 213.

(a) Co. Litt. 808 b; Com. Dig., Pleader (C. 78); Deybel's Case, 4 Barn. & Ald. 243.

(b) Doct. Pl. 102; Per Buller, J., *The King v. Lyme Regis*, Doug. 159.

¹ K. C., M. & B. Ry. v. Phillips, 98 Ala. 159; McDonald v. Alabama Gold Ins. Co., 85 id. 401; Nugent, 72 Tex. 272 13 Am. St. R. 792; Ferguson v. State, 4 G. Greene, 802, 61 Am. Dec. 120; Castro v. Whitlock, 15 Tex. 437; Secrist v. Petty, 109 Ill. 188. For an exhaustive and valuable statement of the subjects of which the court will take judicial notice, see note (by Mr. Robert Desty) to Olive v. State, 4 L. R. A. 1.

bound to know, and can apply, for themselves, to the facts alleged. Thus, if it be stated in pleading that an officer of a corporate body was removed for misconduct by the corporate body at large, it is unnecessary to aver that the power of removal was vested in such corporate body, because that is a power by law incidental to them, unless given by some charter, by-law, or other authority, to a select part only. (c) Nor is it the principles of the *common law* alone which it is unnecessary to state in pleading. The *public statute law* falls within the same reason and the same rule; as the judges are bound, officially, to notice the tenor of every public act of parliament. (d) It is therefore never necessary to set forth a public statute. (e) The case, however, of *private* acts of parliament is different; for these, the court does not officially notice; (f) and therefore, where a party has occasion to rely on an act of this description, he must set forth such parts of it as are material. (g)

It may be observed, however, that though it is in general unnecessary to allege matter of law, yet there is sometimes occasion to make mention of it for the convenience or intelligibility of the statement of fact. Thus, in an action of *assumpsit* on a bill of exchange, the form of the declaration is to state that the bill was drawn or accepted by the defendant, etc. (according to the nature of the case), and that the defendant as drawer or acceptor, etc., *became liable* to pay; and being so liable, in consideration thereof, promised to pay. So it is sometimes necessary to refer to a public statute in general terms to show that the case is intended to be brought within the statute; as, for example, to allege that the defendant committed a certain act *against the form of the statute in such case made and provided*; but the reference is made in this general way only, and there is no need to set the statute forth.

This rule by which matter of law is omitted in the pleadings by no means prevents (it will be observed) the attainment of the requisite certainty of issue. For even though the dis-

(c) *The King v. Lyme Regis*, Doug. 143.

(d) 1 Bl. Com. 85.

(e) *Boyce v. Whitaker*, Doug. 97; *Partridge v. Strange*, Plow. 84.

(f) 1 Bl. Com., *ibid.*; *Platt v. Hill*, Ld. Ray. 381.

(g) *Boyce v. Whitaker*, Doug. 97.

pute between the parties should turn upon matter of law, yet they may evidently obtain a sufficiently specific issue of that description without any *allegation* of law, for *ex facto jus oritur*; that is, every question of law necessarily arises out of some given state of facts, and therefore nothing more is necessary than for each party to state alternately, his case in point of fact; and upon demurrer to the sufficiency of some one of these pleadings, the issue in law must at length (as formerly demonstrated) arise.

As it is unnecessary to allege matter of law, so if it be alleged it is improper (as it has been elsewhere stated) to make it the subject of traverse. (*h*)

Besides points of *law*, there are many other matters of a public kind, of which the court takes official notice, and with respect to which it is for the same reason unnecessary to make allegation in pleading, such as matters antecedently alleged in the same record; (*i*) the time of the king's accession, his proclamations, his privileges; the time and place of holding parliament, the time of its sessions and prorogations and its usual course of proceeding; the ecclesiastical, civil and maritime laws; the customary course of descent in gavelkind and borough English tenure; the course of the almanac; the division of England into counties, provinces and dioceses; the meaning of English words and terms of art (even when only local in their use); legal weights and measures and the ordinary measurement of time; the existence and course of proceeding of the superior courts at Westminster and the other courts of general jurisdiction, and the privileges of the officers of the courts at Westminster. (*k*)

§ 188. 3. It is not necessary to state matter which would come more properly from the other side. (*l*)¹—This, which is the ordinary form of the rule, does not fully express its meaning. The meaning is that it is not necessary to anticipate the answer of the adversary;² which, according to Hale,

(A) *Vide supra*, p. 202.

(i) Co. Litt. 903 b.

(k) This enumeration is principally taken from 1 Chitty, 216-226, where farther information on the subject will be found.

(l) Com. Dig., Pleader (C. 81); *Stowell v. Lord Zouch*, Plow. 376; *Walowigham's Case*, id. 564; *St. John v. St. John*, Hob. 78; *Hotham v. East India Co.*, 1 T. R. 638.

¹ See *Puterbaugh's Com. L. Prac.* 171. ² *Romer v. Conter*, 53 Minn. 171.

C. J., is "like leaping before one comes to the stile." (m) It is sufficient that each pleading should in itself contain a good *prima facie* case, without reference to possible objections not yet urged. Thus, in pleading a devise of land by force of the statute of wills, 32 Hen. 8., ch. 1, it is sufficient to allege that such an one was seised of the land in fee, and devised it by his last will, in writing, without alleging that such devisor was of full age. For though the statute provides that wills made by *femes covert*, or persons within age, etc., shall not be taken to be effectual, yet if the devisor were within age, it is for the other party to show this in his answer, (n) and it need not be denied by anticipation. So, in a declaration of debt upon a bond, it is unnecessary to allege that the defendant was of full age when he executed. (o) So, where an action of debt was brought upon the statute 21 Hen. 6, against the bailiff of a town for not returning the plaintiff, a burgess of that town, for the last parliament (the words of the statute being that the sheriff shall send his precept to the mayor, and, if there be no mayor, then to the bailiff), the plaintiff declared that the sheriff had made his precept unto the bailiff, without averring that there was no mayor. And, after verdict for the plaintiff, this was moved in arrest of judgment. But the court was of opinion clearly that the declaration was good, "for we shall not intend that there was a mayor except it be showed, and if there were one, it should come more properly on the other side." (p) So, where there was a covenant in a charter-party "that no claim should be admitted or allowance made for short tonnage, unless such short tonnage were found and made to appear on the ship's arrival, on a survey to be taken by four shipwrights to be indifferently chosen by both parties," and in an action of covenant brought to recover for short tonnage the plaintiff had a verdict, the defendant moved, in arrest of judgment, that it had not been averred in the declaration that a survey was taken and short tonnage made to appear. But the court held that, if such survey had *not* been taken, this was matter of defense which ought to have been shown by the defendants, and refused to arrest the judgment. (q)

(m) Sir Ralph Bovy's Case, Vent. 217.

(n) Stowell v. Lord Zouch, Plow. 378.

(o) Walsingham's Case, Plow. 564; Sir Ralph Bovy's Case, Vent. 217.

(p) St. John v. St. John, Hob. 78.

(q) Hotham v. East India Co., 1 T. R. 638.

But where the matter is such that its affirmation or denial is essential to the apparent or *prima facie* right of the party pleading, there it ought to be affirmed or denied by him, in the first instance, though it may be such as would otherwise properly form the subject of objection on the other sides. Thus, in an action of trespass on the case, brought by a commoner against a stranger for putting his cattle on the common, *per quod communiam in tam amplo modo habere non potuit*, the defendant pleaded a license from the lord to put his cattle there, but did not aver that there was sufficient common left for the commoners. This was held on demurrer to be no good plea; for though it may be objected that the plaintiff may reply that there was not enough common left, yet, as he had already alleged in his declaration that his enjoyment of the common was obstructed, the contrary of this ought to have been shown by the plea. (r)

There is an exception to the rule in question in the case of certain pleas which are regarded unfavorably by the courts as having the effect of excluding the truth. Such, as it appears, are all pleas in *estoppel* (s) and the plea of *alien enemy*. It is said that these must be *certain in every particular*, which seems to amount to this, that they must meet and remove, by anticipation, every possible answer of the adversary. Thus, in a plea of alien enemy, the defendant must state not only that the plaintiff was born in a foreign country, now at enmity with the king, but that he came here without letters of safe conduct from the king; (t) whereas, according to the general rule in question, such safe conduct, if granted, should be averred by the plaintiff in reply, and need not, in the first instance, be denied by the defendant.

§ 189. 4. It is not necessary to allege circumstances necessarily implied. (u)¹— Thus, in an action of debt on a bond conditioned to stand to and perform the award of W. R.,

(r) *Smith v. Feverell*, 2 Mod. 6; 1 Freeman, 190, S. C.

(s) Co. Litt. 352 b, 353 a; *Dovaston v. Payne*, 2 H. Bl. 530.

(t) *Casseres v. Bell*, 8 T. R. 186.

(u) *Vynior's Case*, 8 Rep. 81 b; Bac. Ab., Pleas, etc. (1), 7; Com. Dig., Pleadar (E. 9); Co. Litt. 353 b; 4 Saund. 365 a, n. 13; Reg. Plab. 101; *Sheers v. Brooks*, 2 H. Bl. 120; *Handford v. Palmer*, 2 Brod. & Bing. 361; *Marsh v. Bulteel*, 5 Barn. & Ald. 507.

¹ *Expressio eorum quæ tacite insunt nihil operatur*. Re *McHugh's* N. C. 336; *Osborne v. Clark*, 60 Cal. Estate, 29 W. N. C. 575, 11 Pa. Co. Ct. 022; *Thorp v. Keokuk Canal Co.*, 48

the defendant pleaded that W. R. made no award. The plaintiff replied that, after the making of the bond and before the time for making the award, the defendant, by his certain writing, revoked the authority of the said W. R. contrary to the form and effect of the said condition. Upon demurrer it was held that this replication was good without averring that W. R. had notice of the revocation, because that was implied in the words "revoked the authority," for there could be no revocation without notice to the arbitrator; so that if W. R. had no notice, it would have been competent to the defendant to tender issue "that he did not revoke in manner and form as alleged." (x) So if a feoffment be pleaded it is not necessary to allege livery of seisin, for it is implied in the word "enfeoffed." (y) So if a man plead that he is heir to A. he need not allege that A. is dead, for it is implied. (z)

§ 190. 5. It is not necessary to allege what the law will presume. (a)¹ — Thus, in debt on a replevin bond, the plaintiffs declared that, at the city of C., and within the jurisdiction of the mayor of the city, they distrained the goods of W. H. for rent, and that W. H., at the said city, made his plaint to the mayor, etc., and prayed deliverance, etc., whereupon the mayor took from him and the defendant the bond on which the action was brought, conditioned that W. H. should appear before the mayor or his deputy at the next court of record of the city, and there prosecute his suit, etc.; and thereupon the mayor replevied, etc. It was held not to be necessary to allege in this declaration a custom for the mayor to grant replevin and take bond and show that the plaint was made in court; because all these circumstances must be *presumed* against the defendant, who executed the bond and had the benefit of the replevin. (b) So, in an action for slander im-

(x) Vynior's Case, 8 Rep. 81 b; Marsh v. Bulteel, 5 Barn. & Ald. 507, S. P.

(y) Co. Litt. 303 b; Doct. Pl. 48, 49; 2 Saund. 305 a, n. 13.

(z) 2 Saund. 305 a, n. 13; Com. Dig., Pleader (E. 9); Dal. 67.

(a) Wilson v. Hobday, 4 M. & S. 125; Chapman v. Pickersgill, 2 Wils. 147; 1 Chitty, 226.

(b) Wilson v. Hobday, 4 M. & S. 125.

N. Y. 253; Malcolm v. O'Reilly, 89 land, 85 Ohio St. 319; Fry v. Bennett, id. 136; Jones v. Andrews, 10 Wall. 28 N. Y. 324; Jaeger v. Hartman, 13 827. Minn. 55; Bennett v. Clough, 1 Barn.

¹ Henke v. Eureka Endowment & Ald. 468; Case v. Carroll, 35 N. Y. Ass'n, 100 Cal. 429; Campbell v. 385.

Cross, 39 Ind. 155; Bolton v. Cleve-

puting theft, the plaintiff need not aver that he is not a thief, because the law presumes his innocence till the contrary be shown. (c)

§ 191. 6. A general mode of pleading is allowed where great prolixity is thereby avoided. (d) — It has been objected, with truth, that this rule is indefinite in its form. (e) Its extent and application, however, may be collected with some degree of precision from the examples by which it is illustrated in the books, and by considering the limitations which it necessarily receives from the rules tending to certainty, as enumerated in a former part of this section.

In *assumpsit* on a promise by the defendant to pay for all such necessaries as his friend should be provided with by the plaintiff, the plaintiff alleged that he provided necessaries amounting to such a sum. It was moved in arrest of judgment that the declaration was not good, because he had not shown what necessaries in particular he had provided. But Coke, C. J. said, "this is good, as is here pleaded for avoiding such multiplicities of reckonings;" and Doddridge, J., "this general allegation, that he had provided him with all necessaries, is good without showing in particular what they were." And the court gave judgment unanimously for the plaintiff. (f) So in *assumpsit* for labor and medicines for curing the defendant of a distemper, the defendant pleaded infancy. The plaintiff replied that the action was brought for necessaries generally. On demurrer to the replication it was objected that the plaintiff had not assigned in certain how or in what manner the medicines were necessary; but it was adjudged that the replication in this general form was good; and the plaintiff had judgment. (g) So in debt on a bond conditioned that the defendant shall pay from time to time the moiety of all such money as he shall receive and give account of it, he pleaded generally that he had paid the moiety of all such

(c) *Chapman v. Pickersgill*, 2 Wils. 147; 1 Chitty, 226.

(d) Co. Litt. 308 b; 2 Saund. 116 b, 411, n. 4; Bac. Ab., Pleas, etc. (L), 3; *Jerny v. Jenny*, Raym. 8; *Agillonby v. Towerson*, id. 400; *Parkes v. Middleton*, Lutw. 421; *Cornwallis v. Savery*, 2 Burr. 772; *Mints v. Bethil*, Cro. Eliz. 749; *Braban v. Bacon*, id. 916; *Church v. Brownwick*, 1 Sid. 334; *Cryps v. Baynton*, 3 Bulst. 31; *Banks v. Pratt*, Sty. 428; *Carth. 110*; *Anson v. Stuart*, 1 T. R. 753; *Hill v. Montagu*, 2 M. & S. 378.

(e) *Huggins v. Wiseman*, 1 Arch. 211.

(f) *Cryps v. Baynton*, 3 Bulst. 31.

(g) *Huggins v. Wiseman*, *Carth. 110*.

money, etc. *Et per curiam*: "This plea of payment is good without showing the particular sums; and that in order to avoid stuffing the rolls with multiplicity of matter." Also they agreed that, if the condition had been to pay the moiety of such money as he should receive, without saying *from time to time*, the payment should have been pleaded specially. (h)

In an action on a bond conditioned that W. W., who was appointed agent of a regiment, should pay all such sum and sums of money as he should receive from the paymaster-general, for the use of the regiment, and faithfully account to and indemnify the plaintiff, the defendant pleaded a general performance and that the plaintiff was not damnified. The plaintiff replied that W. W. received from the paymaster-general, for the use of the said regiment, several sums of money, amounting in the whole to £1,400, for and on account of the said regiment, and of the commissioned and non-commissioned officers and soldiers of the same, according to their respective proportions, and that he had not paid a great part thereof among the colonel, officers and soldiers, etc., according to the several proportions of their pay. Upon demurrer, the court said that "there was no need to spin out the proceedings to a great prolixity by entering into the detail, and stating the various deductions out of the whole pay, upon various accounts, and in different proportions." (i) So in debt on bond conditioned that R. S. should render to the plaintiff a just account, and make payment and delivery of all monies, bills, etc., which he should receive as his agent, the defendant pleaded performance. The plaintiff replied that R. S. received as such agent divers sums of money, amounting to £2,000, belonging to the plaintiff's business, and had not rendered a just account, nor made payment and delivery of the said sum, or any part thereof. The defendant demurred specially, assigning for cause that it did not appear by the replication from whom, or in what manner, or in what proportions, the said sums of money, amounting to £2,000, had been received. But the court held the replication "agreeable to the rules of law and precedents." (k)

(h) *Church v. Brownwick*, 1 Sid. 334; and see *Mints v. Bethil*, Cro. Eliz. 749.

(i) *Cornwallis v. Savery*, 2 Burr. 772.

(k) *Shum v. Farrington*, 1 Bos. & Pul. 640; and see a similar decision, *Burton v. Webb*, 3 T. R. 459.

§ 192. 7. A general mode of pleading is often sufficient where the allegation on the other side must reduce the matter to certainty. (l)—The rule comes into most frequent illustration in pleading *performance in actions of debt on bond*. Bonds may be conditioned either for the performance of certain matters set forth in the condition, or of the covenants or other matters contained in an indenture or other instrument collateral to the bond, and not set forth in the condition. In either case, if the defendant has to plead performance of such matters, the law often allows him to do so, in general terms, without setting forth the manner of performance. For by the usual course of pleading, the plaintiff declares upon the bond as *single*, without noticing the condition, and therefore without alleging any breach of the condition. (m) It follows, therefore, of course, that if the defendant pleads performance, the plaintiff will have to show a breach in his replication; (n) and as this will in all events lead to a sufficient certainty of issue, it becomes unnecessary for the defendant to be specific on his part in his plea, or to do more than allege performance in general terms, according to the words of the condition, leaving the plaintiff in his replication to specify the breach that is supposed to have been committed.

Of the first case, viz., that where the *condition itself sets forth the matters to be performed*, the following is an example. In debt on bond conditioned that the defendant should at all times, upon request, deliver to the plaintiff all the fat and tallow of all beast which he, his servants or assigns, should kill or dress before such a day, the defendant pleaded that upon every request made unto him he delivered unto the plaintiff all the fat and tallow of all beasts which were killed by him or any of his servants or assigns before the said day. On demurrer it was objected "that the plea was not good in such generality; but he ought to have said that he had delivered so much fat or tallow, which was all, etc., or that he had killed so many beasts, whereof he had delivered all the fat." But the court adjudged for the defendant. (o)

(l) Co. Lit. 808 b; Mints v. Bethil, Cro. Eliz. 749; 1 Saund. 117, n. 1; 2 Saund. 410, n. 2; Church v. Brownwick, 1 Sid. 334.

(m) See the form, *supra*, p. 114.

(n) *Vide supra*, p. 357.

(o) Mints v. Bethil, Cro. Eliz. 749; and see Church v. Brownwick, 1 Sid. 334.

Another illustration is afforded by the plea of *non damnificatus* in an action of debt on an indemnity bond, or bond conditioned "to keep the plaintiff harmless and indemnified," etc. This is in the nature of a plea of performance, being used where the defendant means to allege that the plaintiff has been kept harmless and indemnified, according to the tenor of the condition; and it is pleaded in general terms without showing the particular manner of the indemnification. Thus, if an action of debt be brought on a bond conditioned that the defendant "do from time to time acquit, discharge and save harmless the churchwardens of the parish of P., and their successors, etc., from all manner of costs and charges by reason of the birth and maintenance of a certain child," if the defendant means to rely on the performance of the condition he may plead in this general form, "that the churchwardens of the said parish or their successors, etc., from the time of making the said writing obligatory, were not in any manner damaged by reason of the birth and maintenance of the said child;" (*p*) and it will then be for the plaintiff to show in the replication how the churchwardens were damaged.

While thus it is often sufficient to plead performance in general terms, it is said, on the other hand, that this generality is only allowed "where the subject comprehends multiplicity of matters;" and that, if there be *anything specific in the subject*, though consisting of a number of acts, they must all be enumerated; for example, that, if the defendant be bound to "pay all the legacies in a will," he must specify them all and aver payment of each. (*q*) And with respect to the plea of *non damnificatus* in particular, the following distinctions have been taken: First, if, instead of pleading in that form, the defendant alleges affirmatively that he "has saved harmless," etc., the plea will in this case be bad, unless he proceeds to show specifically *how* he saved harmless. (*r*) Again, it is held that if the condition does not use the words "indemnify," or "save harmless," or some equivalent term, but stipulates for the performance of some *specific act*, intended to be by way of indemnity, such as the payment of a sum of money by the

(*p*) *Richard v. Hodges*, 2 Saund. 84; *Hays v. Bryant*, 1 H. Bl. 238; Com. Dig., Pleader (E. 25), (2 W. 33); *Manser's Case*, 2 Rep. 4 a; 7 Went. Index, 615; 5 Went. 531.

(*q*) 1 Saund. 117, n. 1; 1 Bulst. 42; 1 Lutw. 419.

(*r*) 1 Saund. 117, n. 1.

defendant to a third person, in exoneration of the plaintiff's liability to pay the same sum, the plea of *non damnificatus* will be improper; and the defendant should plead performance specifically, as "that he paid the said sum," etc. (s) It is also laid down that, if the conditions of the bond be to "discharge" or "acquit" the plaintiff from a particular thing, the plea of *non damnificatus* will not apply, but the defendant must plead performance specially, "that he discharged and acquitted," etc., and must also show the manner of such acquittal and discharge. (t) But, on the other hand, if a bond be conditioned to "discharge and acquit the plaintiff *from any damage*" by reason of a certain thing, *non damnificatus* may then be pleaded, because that is in truth the same thing with a condition to "indemnify and save harmless," etc. (u)

Next is to be considered the case where the condition is for performance of covenants or other matters *contained in an indenture or other instrument collateral to the bond and not set forth in the condition*. In this case also, the law often allows (upon the same principle as in the last) a general plea of performance without setting forth the manner. (x) Thus, in an action of debt on bond where the condition is that T. J., deputy postmaster of a certain stage, "shall and will truly, faithfully and diligently do, execute and perform all and every the duties belonging to the said office of deputy postmaster of the said stage, and shall faithfully, justly and exactly observe, perform, fulfill and keep all and every the instructions, etc., from his majesty's postmaster-general," and such instructions are in an affirmative and absolute form, as follows: "You shall cause all letters and packets to be speedily and without delay, carefully and faithfully delivered, that shall from time to time be sent unto your said stage to be dispersed there or in the towns and parts adjacent, that all persons receiving such letters may have time to send their respective answers," etc., it is sufficient for the defendant to plead, after setting forth the instructions, "that the said T. J., from the

(s) 1 Bos. & Pul. 638.

(t) 1 Saund. 117, n. 1; Bret v. Andar, 1 Leon. 71; Strange, 422; White v. Cleaver, id. 681; Leneret v. Rivet, Cro. Jac. 508; Harris v. Prett, 5 Mod. 243.

(u) 1 Saund. 117, n. 1; Carth. 375.

(x) Cro. Eliz. 749; Bac. Ab., Pleas, etc. (I.) 3; 2 Saund. 410, n. 3; 1 Saund. 117, n. 1; Com. Dig., Pleader (2 V. 13); Earl of Kerry v. Baxter, 4 East, 340.

time of the making the said writing obligatory, hitherto, hath well, truly, faithfully and diligently done, executed and performed all and every the duties belonging to the said office of deputy postmaster of the said stage, and faithfully, justly and exactly observed, performed, fulfilled and kept all and every the instructions, etc., according to the true intent and meaning of the said instructions," without showing the manner of performance, as that he did cause certain letters or packets to be delivered, etc., being all that were sent. (y) So, if a bond be conditioned for fulfilling all and singular the covenants, articles, clauses, provisos, conditions and agreements comprised in a certain indenture on the part and behalf of the defendant, which indenture contains covenants of an affirmative and absolute kind only, it is sufficient to plead, after setting forth the indenture, that the defendant always hitherto hath well and truly fulfilled all and singular the covenants, articles, clauses, provisos, conditions and agreements comprised in the said indenture on the part and behalf of the said defendant. (z).

But the adoption of a mode of pleading so general as in these examples will be improper where the covenants or other matters mentioned in the collateral instrument are either in the *negative* or the *disjunctive* form; (a) and with respect to such matters the allegation of performance should be more specially made, so as to apply exactly to the tenor of the collateral instrument. Thus, in the example above given, of a bond conditioned for the performance of the duties of a deputy postmaster and for observing the instructions of the postmaster-general, if, besides those in the *positive* form, some of these instructions were in the *negative*, as, for example, "you shall not receive any letters or packets directed to any seaman, or to any private soldier, etc., unless you be first paid for the same, and do charge the same to your account as paid," it would be improper to plead merely that T. J. faithfully performed the duties belonging to the office, etc., and all and every the instructions, etc. Such plea will apply suffi-

(y) 2 Saund. 403 b, 410, n. 3.

(z) Gainsford v. Griffith, 1 Saund. 117, n. 1; Earl of Kerry v. Baxter, 4 East, 340. See the form, 2 Chitty, 463.

(a) Earl of Kerry v. Baxter, 4 East, 340; Oglethorpe v. Hyde, Cro. Eliz. 233; Lord Arlington v. Merricke, 2 Saund. 410, and note 3, *ibid*.

ciently to the positive but not to the negative part of the instructions. (b) The form, therefore, should be as follows: "That the said T. J., from the time of making the said writing obligatory, hitherto, hath well, truly, faithfully and diligently executed and performed all and every the duties belonging to the said office of deputy postmaster of the said stage, and faithfully, justly and exactly observed, performed, fulfilled and kept all and every the instructions, etc., according to the true intent and meaning of the said instructions. And the said defendant farther says that the said T. J., from the time aforesaid, did not receive any letters or packets directed to any seaman or private soldier, etc., unless he, the said T. J., was first paid for the same, and did so charge himself in his account with the same as paid, etc. (c) And the case is the same where the matters mentioned in the collateral instrument are in the *disjunctive* or *alternative* form, as where the defendant engages to do either one thing or another. Here, also, a general allegation of performance is insufficient, and he should show which of the alternative acts was performed. (d)

The reasons why the general allegation of performance does not properly apply to negative or disjunctive matters are, that in the first case the plea would be indirect or *argumentative* in its form; in the second, equivocal; and would in either case, therefore, be objectionable in reference to certain rules of pleading, which we shall have occasion to consider in the next section.

It has been stated in a former part of this work (e) that where a party founds his answer upon any matter set forth by his adversary, but contained in a deed, of which the latter makes profert, he must demand *oyer* of such deed and set it forth. In pleading performance, therefore, of the condition of a bond, where, as is generally the case, the plaintiff has stated in his declaration nothing but the bond itself, without the condition, it is necessary for the defendant to demand *oyer* of the condition and set it forth. (f) And in pleading performance of matters contained in a *collateral* instrument it is

(b) Lord Arlington v. Merricke, 2 Saund. 410, and note 3, *ibid.*

(c) 2 Saund., *ibid.*

(d) Oglethorpe v. Hyde, Cro. Eliz. 233.

(e) *Supra*, p. 159.

(f) 2 Saund. 410, n. 2.

necessary not only to do this but also to set forth and make profert of the whole substance of the collateral instrument; (g) for otherwise it will not appear that the instrument did not stipulate for the performance of negative or disjunctive matters; (h) and, in that case, the general plea of performance of the matters therein contained would, as above shown, be improper.

§ 193. 8. No greater particularity is required than the nature of the thing pleaded will conveniently admit. (i)¹— Thus, though generally, in an action for injury to goods, the *quantity* of the goods must be stated, (k) yet, if they cannot, under the circumstances of the case, be conveniently ascertained by number, weight or measure, such certainty will not be required. Accordingly, in trespass for breaking the plaintiff's close with beasts and eating his peas, a declaration not showing the quantity of peas has been held sufficient, "because nobody can measure the peas that beasts can eat." (l) So, in an action on the case for setting a house on fire, *per quod*, the plaintiff, amongst other divers goods, *ornatus pro equis amisit*, after verdict for the plaintiff it was objected that this was uncertain; but the objection was disallowed by the court. And in this case Windham, J., said that, if he had mentioned only *diversa bona*, yet it had been well enough, as a man cannot be supposed to know the certainty of his goods when his house is burnt, and added that to avoid prolixity the law will sometimes allow such a declaration. (m) So, in an action of debt brought on the statute 23 Hen. 6, ch. 15, against the sheriff of Anglesea for not returning the plaintiff to be a knight of the shire in parliament, the declaration alleged that the plaintiff "was chosen and nominated a knight of the same county, etc., by the greater number of men resident within the said county of Anglesea, present, etc., each

(g) *Ibid.*

(h) See *Earl of Kerry v. Baxter*, 4 East, 340.

(i) *Bac. Ab.*, Pleas, etc. (B.) 5, 5; and p. 409, 5th ed.; *Buckley v. Rice Thomas*, *Flow*. 118; *Wimbish v. Tallbols*, *id.* 54; *Partridge v. Strange*, *id.* 88.

(k) *Vide supra*, p. 387.

(l) *Bac. Ab.*, *ubi supra*.

(m) *Bac. Ab.*, Pleas, etc., p. 409, 5th ed.

¹ See *Pike v. Colvin*, 67 Ill. 228; he made so by a mere reference to *Pearce v. Hall*, 12 Bush (Ky), 208; the preceding pleading. *Sutherland v. Phelps*, 22 Ill. 91.

of whom could dispend 40*s.* of freehold by the year," etc. On demurrer it was objected that the plaintiff "does not show the certainty of the number, as to say that he was chosen by two hundred, which was the greater number, and thereupon a certain issue might arise whether he was elected by so many or not." But it was held that the declaration was "good enough without showing the number of electors; for the election might be made by voices, or by hands, or such other way, wherein it is easy to tell who has the majority, and yet very difficult to know the certain number of them." And it was laid down that, to put the plaintiff "to declare a certainty where he cannot by any possibility be presumed to know or remember the certainty, is not reasonable nor requisite in our law." (n) So, in an action for false imprisonment, where the plaintiff declared that the defendant imprisoned him until he made a certain bond, by duress, to the defendant, "and others unknown," the declaration was adjudged to be good, without showing the names of the others; "because it might be that he could not know their names; in which case the law will not force him to show that which he cannot." (o)

§ 194. 9. Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading. (p)¹—This rule is exemplified in the case of alleging title in an adversary, where (as formerly explained)

(n) *Buckley v. Rice Thomas*, Flou. 118.

(o) Cited Flou. 128. See, also, *Wimbish v. Tailbols*, Flou. 54, 55; *Partridge v. Strange*, id. 85.

(p) *Rider v. Smith*, 3 T. R. 776; *Derisley v. Custance*, 4 T. R. 77; *Attorney-General v. Meller*, Hard. 459; *Denham v. Stephenson*, 1 Salk. 835; *Com. Dig., Pleader (C. 26)*; *Robert Bradshaw's Case*, 9 Rep. 60 b; *Gale v. Read*, 8 East, 80.

¹ Maxwell, Code Pl. 14; *Owens v. Geiger*, 2 Mo. 89, 22 Am. Dec. 435. "The rule of certainty in pleading is not too rigid to be reasonable. It was designed to further, not, defeat the ends of justice." *Durfee, C. J.*, in *Cox v. Providence Gas Co.*, 17 R. I. 199. In actions by employees for injuries received on account of defective machinery, the happening of the accident itself may amount to *prima facie* evidence of negligence, when the instrumentality of the accident is under the defendant's control. "In such cases," said Channel, B., in *Bridges v. North London R. Co.*, L. R. 6 Q. B. 377, "the plaintiff may give the required evidence of negligence without himself explaining the real cause of the accident, by proving the circumstances and thus raising that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant."

a more general statement is allowed than when title is set up in the party himself. (q) So in an action of covenant the plaintiff declared that the defendant, by indenture, demised to him certain premises, with a covenant that he, the defendant, had full power and lawful authority to demise the same according to the form and effect of the said indenture; and then the plaintiff assigned a breach that the defendant had not full power and lawful authority to demise the said premises, according to the form and effect of the said indenture. After verdict for the plaintiff it was assigned for error that he had not in his declaration shown "what person had right, title, estate or interest in the lands demised, by which it might appear to the court that the defendant had not full power and lawful authority to demise." But, "upon conference and debate amongst the justices, it was resolved that the assignment of the breach of covenant was good; for he has followed the words of the covenant negatively; and it lies more properly in the knowledge of the lessor what estate he himself has in the land which he demises than the lessee, who is a stranger to it." (r) So, where the defendant had covenanted that he would not carry on the business of a rope-maker, or make cordage for any person, except under contracts for government, and the plaintiff, in an action of covenant, assigned for breach that after the making of the indenture the defendant carried on the business of a rope-maker and made cordage for divers and very many persons, other than by virtue of any contract for government, etc.; the defendant demurred specially on the ground that the plaintiff "had not disclosed any and what particular person or persons for whom the defendant made cordage, nor any and what particular quantities or kinds of cordage the defendant did so make for them, nor in what manner, nor by what acts, he carried on the said business of a rope-maker, as is alleged in the said breach of covenant." But the court held "that as the facts alleged in these breaches lie more properly in the knowledge of the defendant, who must be presumed conusant of his own dealings than of the plaintiff's, there was no occasion to state them with more particularity," and gave judgment accordingly. (s)

(q) *Vide supra*, pp. 353, 354.

(r) *Robert Bradshaw's Case*, 9 Rep. 60 b.

(s) *Gale v. Read*, 8 East, 80.

sometimes matter
of allegation
must be spe-
cifically alleged,
as when it
is wished to
recover in
a specific
action.
In slander,
the nature of
the damage
is often
specified.

§ 195. 10. Less particularity is necessary in the statement of matter of inducement or aggravation than in the main allegations. (t)¹— This rule is exemplified in the case of the derivation of title, where, though it is a general rule that the commencement of a particular estate must be shown, yet an exception is allowed if the title be alleged by way of inducement only. (u) So where, in *assumpsit*, the plaintiff declared that in consideration that at the defendant's request he had given and granted to him, by deed, the next avoidance of a certain church, the defendant promised to pay £100, but the declaration did not set forth any time or place at which such grant was made, upon this being objected in arrest of judgment after verdict the court resolved that "it was but an inducement to the action, and therefore needed not to be so precisely alleged," and gave judgment for the plaintiff. (x) So in trespass the plaintiff declared that the defendant broke and entered his dwelling-house, and "wrenched and forced open, or caused to be wrenched and forced open, the closet-doors, drawers, chests, cupboards and cabinets of the said plaintiff." Upon special demurrer it was objected that the number of closet-doors, drawers, chests, cupboards and cabinets was not specified. But it was answered "that the breaking and entering the plaintiff's house was the principal ground and foundation of the present action, and all the rest are not foundations of the action, but matters only thrown in to aggravate the damages; and on that ground need not be particularly specified." And of that opinion was the whole court, and judgment was given for the plaintiff. (y)

§ 196. 11. With respect to acts valid at common law but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute. (z) — Thus, by the common law, a

(t) Co. Litt. 308 a; Bac. Ab., Pleas, etc., pp. 322, 348 (5th ed.); Com. Dig., Pleader (E. 43) (E. 10); Doct. Pl. 268; *Wetherell v. Clarkson*, 12 Mod. 597; *Chamberlain v. Greenfield*, 3 Wils. 262; *Alsop v. Sytwell*, Yelv. 17; *Riggs v. Bullingham*, Cro. Eliz. 715; *Woolaston v. Webb*, Hob. 18; *Bishop of Salisbury's Case*, 10 Rep. 59 b; 1 Saund. 274, n. 1.

(u) *Vide supra*, p. 348.

(x) *Riggs v. Bullingham*, Cro. Eliz. 715.

(y) *Chamberlain v. Greenfield*, 3 Wils. 262.

(z) 1 Saund. 276, n. 2; id. 311; *Ansani*, 5 Ark. 519; *Bitch v. Bellamy*, 12 Mod. 546; Bac. Ab., Statute (L.) 3, 4 Hen. 7, 8.

¹ Matters of inducement leading up render a complaint ambiguous, unto a contract counted upon do not certain or unintelligible. *Henke v.*

lease for any number of years might be made by parol only; but by the Statute of Frauds, 29 Car. 2, ch. 3, secs. 1, 2, all leases and terms for years made by parol and not put in writing, and signed by the lessors or their agents authorized by writing, shall have only the effect of leases at will, except leases not exceeding the term of three years from the making. Yet, in a declaration of debt for rent on a demise, it is sufficient (as it was at common law) to state a demise for any number of years without showing it to have been in writing. (a) So, in the case of a promise to answer for the debt, default or miscarriage of another person (which was good by parol at common law, but by the Statute of Frauds, sec. 4, is not valid unless the agreement, or some memorandum or note thereof, be in writing and signed by the party, etc.), the declaration on such promise need not allege a written contract. (b)¹

As to this rule, however, a distinction is taken between a *declaration* and a *plea* and it is said that though in the former the plaintiff need not show the thing to be in writing, in the latter the defendant must. Thus, in an action of *indebitatus assumpsit* for necessities provided for the defendant's wife, the defendant pleaded that before the action was brought the plaintiff and defendant, and one J. B., the defendant's son, entered into a certain agreement by which the plaintiff, in discharge of the debt mentioned in the declaration, was to accept the said J. B. as his debtor for £9, to be paid when he should receive his pay as a lieutenant, and that the plaintiff accepted the said J. B. for her debtor, etc. Upon demurrer judgment was given for the plaintiff, for two reasons: first, because it did not appear that there was any consideration for the agreement; secondly, that admitting the agreement to be valid, yet by the Statute of Frauds it ought to be in writing, or else the plaintiff could have no remedy thereon; "and though

(a) 1 Saund. 276, n. 1.

(b) 1 Saund. 211; Anon., 2 Salk. 519.

Eureka Endowment Ass'n, 100 Cal. 429; 1 Chitty, Pl. *297.

¹ Ecker v. Bohn, 45 Md. 278; Mul-laly v. Holden, 123 Mass. 588; Walker v. Richards, 89 N. H. 259; Speyer v. Desjardins, 144 Ill. 641; Harris Photographic Supply Co. v. Fisher, 81

Mich. 186. In Indiana and Iowa the rule has been changed by statute, and where the contract does not appear to be in writing the presumption is that it is verbal. Pulse v. Miller, 81 Ind. 190; Babcock v. Meek, 45 Ia. 137.

upon such an agreement the plaintiff need not set forth the agreement to be in writing, yet when the defendant pleads such an agreement in bar, he must plead it so as it may appear to the court that an action will lie upon it; for he shall not take away the plaintiff's present action and not give her another upon the agreement pleaded." (c)¹

(c) *Case v. Barber*, Raym. 450. It is observed that the plea was at all events a bad one in reference to the first objection. The case is, perhaps, therefore not decisive as to the validity of the second.

¹ *Gulleg v. Macy*, 84 N. C. 484; *Maybee v. Moore*, 90 Mo. 340. Greater certainty is required in pleading title or authority than in declaring it. 1 Chit. Pl. 560, citing *Gunstead v. Marlow*, 4 Term, 719; *Conger v. Cropsey*, 8 Johns. 242.

CHAPTER IX.

(ORIGINAL SECTION V.)

OF RULES WHICH TEND TO PREVENT OBSCURITY AND CONFUSION IN PLEADING.

RULE I.

✓ § 197. Pleadings must not be insensible nor repugnant. (d)

First, if a pleading be unintelligible (or, in the language of pleading, *insensible*) by the omission of material words, etc., this vitiates the pleading. (e)¹

Again, if a pleading be inconsistent with itself or *repugnant*, this is ground for demurrer.²

Thus where, in an action of trespass, the plaintiff declared for taking and carrying away certain timber lying in a certain place, for the completion of a house then lately built, this declaration was considered as bad for repugnancy, for the timber could not be for the building of a house already built. (f) So where the defendant pleaded a grant of a rent out of a *term of years*, and proceeded to allege that by virtue thereof he was seized in his demesne, *as of freehold*, for the

(d) Com. Dig., Pleader (C. 23); Wyat v. Alaud, 1 Salk. 324; Bac. Ab., Pleas, etc. (I.) 4; Nevil v. Soper, 1 Salk. 213; Butts' Case, 7 Rep. 25; Hutchinson v. Jackson, 2 Lut. 1324; Vin. Ab., Abatement (D. a).

(e) Com. Dig., Pleader (C. 23); Wyat v. Alaud, 1 Salk. 324.

(f) Nevil v. Soper, 1 Salk. 213.

¹ Libbey v. Brown, 4 Pick. 137, the demurrer must be special. Heeser v. Miller, 77 Cal. 192. In some, Puterbaugh's Com. L. Prac. 171.

² Raymond v. People, 9 Ill. App. 344; Barber v. Summers, 5 Blackf. 339; Hewett v. Brown, 21 Minn. 163. The code practice has introduced some contrariety of decision as to the manner of taking advantage of repugnancy and inconsistency. In some states it is ground for demurrer. Fleischman v. Bennett, 87 N. Y. 238. *Contra*, McDonough v. Kane, 75 Ind. 181. In some it is held that

the demurrer must be special. Heeser v. Miller, 77 Cal. 192. In some, by motion to strike out one requiring the pleader to elect which. Taber v. Com. Nat. Bank, 62 Fed. Rep. 383; Hewett v. Brown, 21 Minn. 163. *Inconsistent defenses* in an answer may be demurred to or reached by motion to strike out; if not taken advantage of at trial they are waived, Uridias v. Morrell, 25 Cal. 31; Klink v. Cohen, 13 id. 623; Arnold v. Dimon, 4 Sandf. 680.

term of his life, the plea was held bad for repugnancy. (g) But there is this exception: That if the second allegation, which creates the repugnancy, is merely superfluous and redundant, so that it may be rejected from the pleading without materially altering the general sense and effect, it shall in that case be rejected and shall not vitiate the pleading, for the maxim is *utile, per inutile, non vitiatur*. (h)¹

RULE II

✓ § 198. Pleadings must not be ambiguous or doubtful in meaning; and when two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading. (i)²—

Thus if, in trespass *quare clausum fregit*, the defendant pleads

(g) Butts' Case, 7 Rep. 25.

(h) Gilb. C. P. 131-2; The King v. Stevens, 5 East, 255; Wyat v. Aland, 1 Salk. 324-5; 2 Saund. 306, n. 14; Co. Litt. 303 b.

(i) Co. Litt. 303 b; Purcell v. Bradley, Yelv. 36; Devaston v. Payne, 2 H. Bl. 530; Thornton v. Adams, 5 M. & S. 38.

¹The King v. Hollingberry, 6 Dowl. & Ry. 345, 4 Barn. & Crea. 328; Briston v. Wright, Doug. 665; 1 Smith's L. C. 1417; Sneed v. Harriess, 109 N. C. 349, 14 L. R. A. 389; Goff v. Toledo, St. L. & K. C. R., 28 Ill. App. 529; Crawley v. Com., 123 Pa. St. 275. Such allegations may be stricken from an answer. Tabor v. Commercial Nat. Bank, 62 Fed. Rep. 383.

²Lord v. Ocean Bank, 20 Pa. St. 384, 59 Am. Dec. 726; President, etc. of Natchez v. Minor, 9 Sm. & M. 544, 48 Am. Dec. 727; Green v. Covilland, 10 Cal. 317, 70 Am. Dec. 725; Ferris v. N. A. Fire Ins. Co., 1 Hill, 71; Slocum v. Clark, 2 id. 475; Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478; Bush v. Dunham, 4 Mich. 339; Browne v. Moore, 32 id. 254; Moore v. Com., 6 Met. 243, 39 Am. Dec. 734; Allen v. Patterson, 3 Seld. 476; Kohn v. Hinshaw, 17 Ore. 308; Clark v. Dillon, 97 N. Y. 370; Evans v. Collier, 79 Ga. 815; Bunge v. Koop,

48 N. Y. 225; Farrell v. Amberg, 59 N. Y. S. R. 449; Cook v. Rome Brick Co., 98 Ala. 409; Dougherty v. Callett, 129 Ill. 431. The rule is that when the pleader is stating his right or deriving his title, the construction most unfavorable to him will be adopted when there are equivocal or uncertain allegations in the plea. May v. First Nat. Bank, 19 Ill. App. 604; Henkel v. Heyman, 91 Ill. 96. The pleadings must be construed with reasonable intendments, and the terms used must be applied in their natural and usual sense. Baterson v. Chicago & G. T. Ry. Co., 49 Mich. 185. It is held in Missouri, under the code, that the language of the pleading should be given such an interpretation as fairly appears to have been intended by the pleader. Stillwell v. Hannon, 97 Mo. 579. See Twohey v. Truin, 96 id. 104.

After judgment a pleading is to be construed in favor of the pleader and in support of the judgment. Sha-

that the *locus in quo* was his freehold, he must allege that it was his freehold *at the time of the trespass*; otherwise the plea is insufficient. (k) So in debt on a bond conditioned to make assurance of land, if the defendant pleads that he executed a release, his plea is bad if it does not express *that the release concerns the same land*. (l) In trespass *quare clausum fregit*, and for breaking down two gates and three perches of hedges, the defendant pleaded that the said close was within the parish of R., and that all the parishioners there from time immemorial had used to go over the said close upon their perambulation in Rogation week; and because the plaintiff had wrongfully erected *two gates and three perches of hedges* in the said way, the defendant, being one of the parishioners, broke down those gates and those three perches of hedges. On demurrer it was objected that, though the defendant had justified the breaking down two gates and three perches of hedges, it does not appear that they were the *same gates and hedges* in respect of which the plaintiff complained; it not being alleged that they were the gates and hedges "*aforesaid*" or the gates and hedges "*in the declaration mentioned*." "And thereto agreed all the justices that this fault in the bar was incurable. For Walmsley said that he thereby doth not answer to that for which the plaintiff chargeth him." And he observed that the case might be that the plaintiff had erected *four gates and six perches* of hedges; and that the defendant had broken down the whole of these, having the justification mentioned in the plea in respect of two gates and three perches only,

(k) Com. Dig., Pleader (E. 5)

(l) Com. Dig., *ubi supra*, Mauser's Case, 2 Rep. 3.

han v. Tallman, 89 Kan. 185. The rule has been held to be so far modified by the code, as to require the pleadings to be liberally construed with a view to substantial justice between the parties. This modification, however, extends only to matters of form, and does not apply to the fundamental requisites of a cause of action. Clark v. Dillon, 97 N. Y. 370; Bunge v. Koop. 48 id. 225. A construction of doubtful or uncertain allegations which enables a party, by thus pleading, to throw upon his adversary the hazard of correctly interpreting their meaning, is no more allowable now than formerly; and when a pleading is susceptible of two meanings, that shall be taken which is most unfavorable to the pleader. Bates v. Rosekrans, 23 How. Pr. 98; Clark v. Dillon, *supra*; Isaacs v. Holland, 4 Wash. 53; Supply Ditch Co. v. Elliott, 10 Colo. 327, 3 Am. St. Rep. 566.

and no defense as to the remainder; and that the action might be brought in respect of the latter only. (*m*)

§ 199. Degree of certainty required.—A pleading, however, is not objectionable, as ambiguous or obscure, if it be *certain to a common intent*, (*n*)¹ that is, if it be clear enough according to reasonable intendment or construction, though not worded with absolute precision. (*o*)² Thus, in debt on a bond conditioned to procure A. S. to surrender a copyhold to the use of the plaintiff, a plea that A. S. surrendered and released the copyhold to the plaintiff in full court, and the plaintiff accepted it, without alleging that the surrender was *to the plaintiff's use*, is sufficient; for this shall be intended. (*p*) So, in debt on a bond conditioned that the plaintiff shall enjoy certain land, etc., a plea that after the making of the bond until the day of exhibiting the bill, the plaintiff did enjoy, is good, though it be not said that *always* after the making until, etc., he enjoyed, for this shall be intended. (*q*)

§ 200. The negatives pregnant.—It is under this head of *ambiguity* that the doctrine of *negatives pregnant* appears most properly to range itself. A *negative pregnant* is such a form of negative expression as may imply or carry within it an affirmative.³ This is considered as a fault in pleading, and

(*m*) Cro. Eliz. 441.

(*n*) Com. Dig., Pleader (E. 7), (F. 17); 1 Saund. 49, n. 1; Long's Case, 5 Rep. 121 a; Doct. Pl. 58; Colthirst v. Bejushin, Plow. 26, 28, 33; Fulmerston v. Stunard, id. 102; Cooper v. Monke, Willes, 52; The King v. Lyme Regis, 1 Doug. 159; Hammond v. Dod, Cro. Car. 5; Poynter v. Poynter, id. 194; Dovaston v. Payne, 2 H. Bl. 530; Jacobs v. Nelson, 3 Taunt. 423.

(*o*) It will be observed that the word "certain" is here used, not in the sense of *particular or specific*, as in former parts of this work, but in its other meaning of *clear or distinct*. See the double use of this word noticed, *supra*, p. 214.

(*p*) Hammond v. Dod, Cro. Car. 6.

(*q*) Harlow v. Wright, id. 195.

¹ Certainty is of three kinds: (1) To a common intent; (2) to a certain intent in general, as in indictments; (3) a certain intent in every particular, as in pleas not favored by the law. See *supra*, p. 386, and Plea in Abatement, *supra*, p. 139. See 1 Bish. Crim. Proc. 323; l'Anson v. Stuart, 2 Smith's L. C. 986, notes; Dovaston v. Payne, 3 H. Black. 530, 2 Smith's L. C. 140.

² Spencer v. Southwick, 9 Johns. 314; Oystend v. Shed, 12 Mass. 509; Parker v. Burgess, 64 Vt. 442; Gran-

nis v. Hooker, 29 Wis. 65; Merkle v. Bennington, 68 Mich. 133; Weiss v. Whittemore, 28 id. 366; Batterson v. Chicago & G. R. R. Co., 49 id. 184.

³ Coal Co. v. Sanitarium Co., 7 Utah, 158 (a case excellently illustrating the subject); Woodworth v. Knowlton, 23 Cal. 164; Bradbury v. Cronise, 46 id. 287; Ex parte Wall, 107 U. S. 265. In the last case

the reason why it is so considered is that the meaning of such a form of expression is ambiguous. In trespass for entering the plaintiff's house, the defendant pleaded that the plaintiff's daughter gave him license to do so, and that he entered by that license. The plaintiff replied that *he did not enter by her license*. This was considered as a *negative pregnant*; and it was held that the plaintiff should have traversed the entry by itself, or the license by itself, and not both together. (r) It will be observed that this form of traverse may imply, or carry within it, that a license was given, though the defendant did not enter by that license. It is therefore, in the language of pleading, said to be pregnant with that admission, viz., that a license was given. (s) At the same time the license is not expressly admitted; and the effect, therefore, is to leave it in doubt whether the plaintiff means to deny the license, or to deny that the defendant entered by virtue of that license. It is this *ambiguity* which appears to constitute the fault. (t) The following is another example: In trespass for assault and battery the defendant justified for that he, being master of a ship, commanded the plaintiff to do some service in the ship, which he refusing to do, the defendant moderately chastised him. The plaintiff traversed, with an *absque hoc*, that the defendant moderately chastised him; and this traverse was held to be a negative pregnant; for, while it apparently means to put in issue only the question of excess (admitting, by implication, the chastisement), it does not necessarily and distinctly make that admission, and is therefore ambiguous in its form. (u) If the plaintiff had replied that the defendant immoderately chastised him, the objection

(r) *Myn v. Cole*, Cro. Jac. 87.

(s) *Bac. Ab.*, Pleas, etc., p. 420, 5th ed.

(t) 25 Ren. 6, 7; *Slade v. Drake*, Hob. 295; *Styles' Pract. Reg.*, tit. *Negative Pregnant*. See Appendix, note (67).

(u) *Anhlin v. James*, Vent. 70; *Sld.* 444; 2 *Keb.* 622.

the charge was that Wall "did on, and riotous gathering or mob in taking, etc., engage in, and with an unlawful, tumultuous and riotous gathering, he advising and encouraging thereto, take from the jail, etc., and hang," etc. The respondent denied also, Davison v. Powell, 16 How. Pr. 497; *Seattle Nat. Bank v. Neerwaldt*, 8 Wash. 630.

would have been avoided; but the proper form of traverse would have been *de injuria sua propria absque tali causa*. (x) This, by traversing the whole "cause alleged," would have distinctly put in issue all the facts in the plea, and no ambiguity or doubt as to the extent of the denial would have arisen.

This rule, however, against a negative pregnant appears, in modern times at least, to have received no very strict construction; for many cases have occurred in which, upon various grounds of distinction from the general rule, that form of expression has been held free from objection. (y). Thus, in debt on a bond conditioned to perform the covenants in an indenture of lease, one of which covenants was that the defendant, the lessee, would not deliver possession to any but the lessor, or such persons as should lawfully evict him, the defendant pleaded that he *did not deliver the possession to any but such as lawfully evicted him*. On demurrer to this plea it was objected that the same was ill, and a *negative pregnant*; and that he ought to have said that such an one lawfully evicted him, to whom he delivered the possession, or that he did not deliver the possession to any; but the court held the plea, as *pursuing the words of the covenant*, good, being in the negative, and that the plaintiff ought to have replied and assigned a breach; and therefore judgment was given against him. (z)

RULE III

§ 201. Pleadings must not be argumentative. (a) —

In other words, they must advance their positions of fact in an absolute form, and not leave them to be collected by inference and argument only.¹

(x) *Anhurn v. James*, Vent. 70. See, as to the traverse *de injuria*, *supra*, p. 241.

(y) See several cases mentioned in Com. Dig., Pleader (R. 6).

(z) *Pullin v. Nicholas*, 1 Lev. 83. *Vide* Com. Dig., Pleader (R. 6). *Semb. cont.*, *Lee v. Luthell*, Cro. Jac. 359.

(a) Bac. Ab., Pleas, etc. (L) 5; Com. Dig. (E. 3); Co. Litt. 303 a.

¹ *Thompson v. Munger*, 15 Tex. 533; *Fletcher v. Peck*, 6 Cranch, 87; *Morris v. Thomas*, 57 Ind. 316; *De Spencer v. Southwick*, 9 Johns. 813; *Forrest v. Butler*, 62 Ia. 78. It is no plea of a fact to plead another fact from which, if in evidence, the material fact might be inferred. *Supply Ditch Co. v. El-liott*, 10 Colo. 327, 3 Am. St. Rep. 586; *v. Granger*, 4 Gilm. 78; *Spruck v. For-*

Thus, in an action of trover for ten pieces of money, the defendant pleaded that there was a wager between the plaintiff and one C. concerning the quantity of yards of velvet in a cloak; and the plaintiff and C. each delivered into the defendant's hand ten pieces of money, to be delivered to C. if there were ten yards of velvet in the cloak, and if not, to the plaintiff; and proceeded to allege *that, upon measuring of the cloak, it was found that there were ten yards of velvet therein*; whereupon the defendant delivered the pieces of money to C. Upon demurrer, "Gawdy held the plea to be good enough; for the measuring thereof is the fittest way for the trying it, and when it is so found by the measuring, he had good cause to deliver them out of his hands to him who had won the wager. But Fenner and Popham held that the plea was not good; for it may be that the measuring was false; and therefore he ought to have averred, in fact, that there were ten yards; and that it was so found upon the measuring thereof." (b) So in an action of trespass, for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods. "This is an infallible *argument*, that the defendant is not guilty, and yet it is no plea." (c) Again, in ejectment, the defendant pleaded a surrender of a copyhold, by the hand of Fosset, then steward of the manor. The plaintiff traversed *that Fosset was steward*. All the court held this to be no issue, and that the traverse ought to be *that he did not surrender*; for if he were not steward the surrender is void. (d) The reason of this decision appears to be that to deny that Fosset was steward could be only so far material as it tended to show that the surrender was a nullity; and that it was, therefore, an argumentative denial of the surrender; which, if intended to be traversed, ought to be traversed in a direct form.

(b) *Ledesham v. Lubram*, Cro. Ellz. 870.

(c) Doct. Pl. 41; *Dyer*, 43.

(d) *Wood v. Butts*, Cro. Ellz. 260.

sythe, 40 Ill. 440; *Dyett v. Pendleton*, 8 Conn. 728; *Church v. Gilman*, 15 Wend. 656; *Daniels v. Hallenbeck*, 19 Wend. 410. But a fact which is necessarily inferred from the fact stated is pleaded. Supply *Ditch Co. v. Elliott*, 10 Colo. 327, 8 Am. St. Rep. 586. Argumentativeness must be raised by special demurrer and is aided by pleading. But an argumentative denial which contained facts constituting a defense was held good in *Loeb v. Weis*, 64 Ind. 285.

§ 202. **Two affirmatives do not make a good issue.**—It is a branch of this rule *that two affirmatives do not make a good issue.* (e) The reason is, that the traverse by the second affirmative is argumentative in its nature. Thus, if it be alleged by the defendant that a party died seised in fee, and the plaintiff allege that he died seised in tail, this is not a good issue, (f) because the latter allegation amounts to a denial of a seisin in fee, but denies it by argument or inference only. It is this branch of the rule against *argumentativeness* that gave rise (as in part already explained) (g) to the form of a *special traverse*. Where, for any of the reasons mentioned in a preceding part of this work, it becomes expedient for a party traversing to set forth new affirmative matter, tending to explain or qualify his denial, he is allowed to do so; but as this, standing alone, will render his pleading *argumentative*, he is required to add to his affirmative allegation an express denial, which is held to cure or prevent the argumentativeness. (h) Thus in the example last given the plaintiff may allege, if he pleases, that the party died seised in tail; but then he must add *absque hoc, that he died seised in fee*, and thus resort to the form of a special traverse. (i) The doctrine, however, that two affirmatives do not make a good issue is not taken so strictly but that the issue will in some cases be good, if there is a sufficient negative and affirmative in *effect*, though in the *form of words* there be a double affirmative. Thus if the defendant plead that he was born in France, and the plaintiff that he was born in England, this is said to be a good issue. (k) So in debt on a lease for years, when the defendant pleaded that the plaintiff had nothing at the time of the lease made, and the plaintiff replied that he was seised in fee, this was held a good issue. (l)

§ 203. **Two negatives.**—Another branch of the rule against argumentativeness is *that two negatives do not make a good*

(e) Com. Dig., Pleader (B. 3); Co. Litt. 126 a; per Buller, J., *Chandler v. Roberts*, Doug. 80; Doct. Pl. 43.

(f) Doct. Pl. 349; 5 Hen. 7, 11, 12.

(g) *Supra*, p. 254.

(h) Bac. Ab., Pleas, etc. (H.) 3; *Courtney v. Phelps*, Sid. 301; *Herring v. Blacklow*, Cro. Eliz. 30; 10 Hen. 6, 7, pl. 21.

(i) Doct. Pl. 349.

(k) *Tomlin v. Burloe*, 1 Wils. 6.

(l) Co. Litt. 126 a; Reg. Plac. 297, 8.

RULE V.

§ 205. Pleadings must not be by way of recital, but must be positive in their form. (s)¹—

The following example will be sufficient to illustrate this kind of fault. If a declaration in trespass for assault and battery make the charge in the following form of expression,—“and thereupon the said A. B., by ———, his attorney, complains: For that, *whereas* the said C. D. heretofore, to wit, etc., made an assault,” etc., instead of “For *that* the said C. D. heretofore, to wit, etc., made an assault,” etc., this is bad, for nothing is positively affirmed. (t)

RULE VI.

§ 206. Things are to be pleaded according to their legal effect or operation. (u)²—

The meaning is that, in stating an instrument or other matter in pleading, it should be set forth, not according to its *terms* or its *form*, but according to its *effect in law*; and the reason seems to be that it is under the latter aspect that it must principally and ultimately be considered; and, therefore, to plead it in terms of form only is an indirect and circuitous

(s) Bac. Ab., Pleas, etc. (B. 4); *Sherland v. Heaton*, 2 Bulst. 214; *Wettenhall v. Sherwin*, 2 Lev. 206; *Hore v. Chapman*, 2 Salk. 686; *Dunstall v. Dunstall*, 2 Show. 27; *Gourney v. Fletcher*, id. 295; *Dobbs v. Edmunds*, Lord Ray. 1418; *Wilder v. Handy*, Str. 1151; *Marshall v. Riggs*, id. 1162.

(t) Bac. Ab., Pleas, etc. (B. 4); *Sherland v. Heaton*, 2 Bulst. 214; *Wettenhall v. Sherwin*, 2 Lev. 206; *Hore v. Chapman*, 2 Salk. 686; *Dunstall v. Dunstall*, 2 Show. 27; *Gourney v. Fletcher*, id. 295; *Dobbs v. Edmunds*, Lord Raym. 1413; *Wilder v. Handy*, Str. 1151, 1162. It will be observed, however, that in *trespass on the case* the “whereas” is unobjectionable, being used only as introductory to some subsequent positive allegation. See the same cases and the form of declaration in the first chapter.

(u) Bac. Ab., Pleas, etc. (I.) 7; Com. Dig., Picader (C. 37); 2 Saund. 97, and 97 b, n. 2; *Barker v. Lade*, 4 Mod. 150; *Moore v. Earl of Plymouth*, 3 Barn. & Ald. 66.

¹ *Hollingsworth v. Holshausen*, 17 Tex. 41.

² It is sometimes said that the practice under this rule involves a fiction, yet the rule is very generally applied in code states. *Grannis v. Hooker*, 29 Wis. 65; *Hosley v. Black*, 28 N. Y. 438; *Kerstetter v. Raymond*, 10 Ind. 199; *Bateman v. Clark*, 37 Mo. 81; *Aultman & Co. v. Siglinger*, 2 S. Dak. 442. In California it has

been recently held that the facts from which an implied promise arise must be alleged. *Poley v. Williams*, 101 Cal. 648. But in New York a common count is sufficient. *Terry v. Munger*, 121 N. Y. 101. Setting out a written contract is allowable and is sufficient. *Continental Ins. Co. v. Rogers*, 119 Ill. 474. See p. 108, note 2.

method of allegation. Thus, if a joint tenant conveys to his companion by the words "gives," "grants," etc., his estate in the lands holden in jointure, this, though in its terms a *grant*, is not properly such in operation of law, but amounts to that species of conveyance called a *release*. It should therefore be pleaded, not that he "granted," etc., but that he "released," etc. (x) So, if a tenant for life grant his estate to him in reversion, this is, in effect, a *surrender*, and must be pleaded as such, and not as a *grant*. (y) So where the plea stated that A. was entitled to an equity of redemption, and, subject thereto, that B. was seised in fee, and that they, by lease and release, granted, etc., the premises, excepting and reserving to A. and his heirs, etc., a liberty of hunting, etc., it was held upon general demurrer, and afterwards upon writ of error, that, as A. had no legal interest in the land, there could be no *reservation* to him; that the plea, therefore, alleging the right (though in terms of the deed) by way of *reservation* was bad; and that if (as was contended in argument) the deed would operate as a *grant* of the right, the plea should have been so pleaded, and should have alleged a *grant* and not a *reservation*. (z)¹

The rule in question is, in its terms, often confined to *deeds* and *conveyances*. It extends, however, to all instruments in writing, and contracts, written or verbal; and, indeed, it may be said, generally, to all matters or transactions whatever which a party may have occasion to allege in pleading, and in which the form is distinguishable from the legal effect. But there is an exception in the case of a declaration for written or verbal *slander*, where (as the action turns on the words themselves) the words themselves must be set forth and it is not sufficient to allege that the defendant published a libel containing false and scandalous matters, *in substance* as follows, etc., or used words *to the effect* following, etc. (a)²

(x) 2 Saund. 97; *Barker v. Lade*, 4 Mod. 150-1.

(y) *Barker v. Lade*, 4 Mod. 151.

(z) *Moore v. Earl of Plymouth*, 3 Barn. & Ald. 66.

(a) *Wright v. Clements*, 3 Barn. & Ald. 503; *Cook v. Cox*, 3 M. & S. 110; *Newton v. Stubbs*, 2 Show. 436. See an example of the manner in which a libel is set forth, *supra*, p. 122.

¹ See *Stoddard v. Treadwell*, 26 Cal. 204; *Jones v. Louderman*, 39 Mo. 287.

² See *supra*, p. 123.

RULE VII

§ 207. Pleadings should observe the known and ancient forms of expression, as contained in approved precedents. (b)¹

Thus, so long ago as in the time of Bracton, in the count on a writ of right, there were certain words of form, besides those contained in the writ, that were considered as essential to be inserted. It was necessary to allege "the seisin" of the ancestor "in his demesne as of fee," and "of right," "by taking the esplees," "in the time of such a king," and (if the seisin were alleged at a period of civil commotion) "in time of peace." (c) And all this is equally necessary in framing a count on a writ of right at the present day; and no parallel or synonymous expressions will supply the omis-

(b) Com. Dig., Abatement (G. 7); Buckley v. Rice Thomas, Plow. 123; Dally v. King, 1 H. Bl. 1; Slade v. Dowland, 2 Bos. & Pul. 570; Dowland v. Slade, 5 East, 272; King v. Fraser, 6 East, 351; Dyster v. Battye, 3 Barn. & Ald. 448; Per Abbott, O. J., Wright v. Clements, id. 507.

(c) Bract. 373 a, b.

¹ The case in which is found the oft-quoted doctrine of Judge Kent, where he says: "I entertain a decided opinion that the established principles of pleading . . . ought to be very cautiously touched by the hand of innovation," Bayard v. Malcolm, 1 Johns. 453-471 (1806), quoted in another place, furnishes a good illustration of the ancient strictness as to forms of expression. The case was reversed in the court of errors. Bayard v. Malcolm, 2 John. 550. The chancellor said that it was a maxim that "no fiction shall work an injury" (3 Black. Com. *43), and it was held that it was not necessary to use "the ancient form of expression," as ordinarily used in alleging a *scienter*, but that any equivalent language was sufficient, especially after verdict; and such has been the trend of modern authority everywhere, as we have seen in many instances. See *Assumpsit, supra*.

See a valuable case in the notes. Beebe v. Knapp, 28 Mich. 53; also Libby, McN. & L. v. Sherman, 146

Ill. 540; Pomeroy, Code Rem. (3d ed.), § 108, p. 137.

In 1855, in an action under the code, Denio, J., said that a complaint should contain the substance of declaration under the former system, holding that if the averment can be gathered from the language it is sufficient; but "a concise averment in the terms mentioned in the books would have been better and more in accordance with the spirit of the code." Zabriskie v. Smith, 13 N. Y. 330.

Another judge in a code state says: "The former *precedents and rules and adjudications* may now be resorted to as authority, except so far as they relate to the distinction between different forms of actions or to merely *formal or technical allegations*." Hill v. Barrett, 14 B. Mon. 83.

We have heretofore seen that the substantial words of the ancient forms are useful and utilized under the code. See Election of Remedies and Common Counts, *supra*.

sion. (d) So, too, the *general issues* are examples of forms of expression fixed by ancient usage from which it is improper to depart. And another illustration of this rule occurs in the following modern case: To an action on the case the defendants pleaded the statute of limitations, viz., *that they were not guilty within six years*, etc. The court decided upon special demurrer that this form of pleading was bad, upon the ground that "from the passing of the statute to the present case the invariable form of pleading the statute to an action on the case for a wrong has been to allege *that the cause of action did not accrue within six years*," etc., and that it was important to the administration of justice that the usual and established forms of pleading should be observed." (e)

It may be remarked, however, with respect to this rule, that the allegations to which it relates are of course only those of frequent and ordinary recurrence, and that even as to these it is rather of uncertain application, as it must be often doubtful whether a given form of expression has been so fixed by the course of precedent as to admit of no variation. (f)

Another rule, connected in some measure with the last and apparently referable to the same object, is the following:

RULE VIII.

§ 208. Pleadings should have their proper formal commencements and conclusions. (g) —

This rule refers to certain formulæ occurring at the *commencement* of pleadings subsequent to the declaration and to others occurring at the *conclusion*.

A formula of the latter kind, inasmuch as it prays the judgment of the court for the party pleading, is often denominated the *prayer of judgment*, and occurs (it is to be observed) in all pleadings that do not tender issue, but in those only.

(d) *Slade v. Dowland*, 2 Bos. & Pul. 570; *Dally v. King*, 1 H. Bl. 1; *Dowland v. Slade*, 5 East, 272.

(e) *Dyster v. Hattye*, 3 Barn. & Ald. 448.

(f) See Appendix, note (59).

(g) Co. Litt. 303 b; Com. Dig., Pleader (E. 27), (E. 28), (E. 29), (E. 33), (F. 4), (F. 5), (G. 1); Com. Dig., Abatement (I. 12); 2 Saund. 310; Per Holt, C. J., *Bowyer v. Cook*, 5 Mod. 146.

A *plea to the jurisdiction* has usually no commencement of the kind in question. (*h*) Its conclusion is as follows:¹

— the said C. D. prays judgment if the court of our lord the king here will or ought to have farther cognizance of the plea (*i*) aforesaid.

Or (in some cases) thus:

— the said C. D. prays judgment if he ought to be compelled to answer to the said plea here in court. (*k*)

A *plea in suspension* seems also to be in general pleaded without a formal commencement. (*l*) Its conclusion (in the case of a plea of *non-age*) is thus:²

— the said C. D. prays that the parol may demur [*or*, that the said plea may stay and be respited] until the full age of him, the said C. D., etc. (*m*)

A *plea in abatement* is also usually pleaded without a formal commencement within the meaning of this rule. (*n*) The conclusion is thus:

In case of plea to the writ or bill,—

— prays judgment of the said writ and declaration [*or*, bill], and that the same may be quashed. (*o*)

In case of plea to the person,—

— prays judgment if the said A. B. ought to be answered to his said declaration [*or*, bill]. (*p*)

(*h*) 1 Chitty, 450. But sometimes it has such commencement. See *Ibid*.

(*i*) 1 Went. 49; 3 Bl. Com. 308; Powers v. Cook, Ld. Raym. 63.

(*k*) 1 Went. 41, 49; Bac. Ab., Pleas, etc. (E.) 2; Per Holt, C. J., Bowyer v. Cook, 5 Mod. 146; Powers v. Cook, Ld. Raym. 63.

(*l*) 2 Chitty, 472; Ploket v. Beeby, 4 East, 485.

(*m*) *Ibid*.; 1 Went. 43. As for the form in other pleas in suspension, see Lib. Plac. 9, 10; 1 Went. 15; 1 Saund. 210, n. 1; John Trollop's Case, 8 Rep. 69; Reg. Plac. 180; Onslow v. Smith, 2 Bos. & Pul. 384; 1 Chitty, 450.

(*n*) 2 Saund. 209 a, n. 1; 1 Arch. 305. (Query? See the precedents, 2 Chitty, tit. Pleas in Abatement; 1 Went., tit. Abatement; 1 Bos. & Pul. 60.) But if a matter apparent on the face of the writ be pleaded (a thing which does not occur in modern practice, *vide supra*, p. 142), there should be a commencement. See this matter explained, Saund. and Arch., *Ibid*.

(*o*) Powers v. Cook, Ld. Ray. 63; 2 Saund. 209 a, n. 1; Com. Dig., Abatement (I. 12); 2 Chitty, 414. Yet, in some instances, it seems it may be *si curia cognoscere velit*. Chatland v. Thornly, 12 East, 544; 2 Chitty, 411. In proceedings by bill it seems that it is informal to pray judgment of the declaration or of the bill and declaration. 1 Chitty Rep. 706.

(*p*) Co. Litt. 128 a; Com. Dig., Abatement (I. 12); 1 Went. 58, 62. See Appendix, note (70).

¹ Drake v. Drake, 83 Ill. 526. Cf. ²This is matter of substance in such pleas. Waterman v. Holmes, 62 Vt. 468; Ross v. Nesbit, 2 Gilm. 296.

²See *ante*, § 70, note 1; Gibson v. Bourland, 13 Ill. App. 352; Kenyon v. Sutherland, 8 Gilm. 99. 252; C. & N. W. Ry. Co. v. Jenkins, 103 Ill. 553; Pitts' Sons' Mfg. Co. v. Com. Nat. Bank, 121 Ill. 528.

A plea in bar has this commencement:

— says that the said A. B. ought not to have or maintain his aforesaid action against him, the said C. D., because he says, etc.

This formula is commonly called *actio non*.

The conclusion is,—

— prays judgment if the said A. B. ought to have or maintain his aforesaid action against him.

A replication to a plea to the jurisdiction has this commencement:

— says that, notwithstanding anything by the said C. D. above alleged, the court of our lord the king here ought not to be precluded from having farther cognizance of the plea aforesaid, because he says, etc. (q)

Or this,—

— says that the said C. D. ought to answer to the said plea here in court, because he says, etc. (r)

And this conclusion:

— wherefore he prays judgment, and that the court here may take cognizance of the plea aforesaid, and that the said C. D. may answer over, etc. (s)

A replication to a plea in suspension (in the case of a plea of *non-age*) has this commencement:

— says that, notwithstanding anything by the said C. D. above alleged, the parol ought not farther to demur [or, the said plea ought not farther to stay or be respited], because he says, etc. (t)

And, if there should be any case in which such replication does not tender issue, it should probably have this conclusion:

— wherefore he prays judgment if the parol ought farther to demur [or, if the said plea ought farther to stay or be respited], and that the said C. D. may answer over.

A replication to a plea in abatement has this commencement:

Where the plea was to the writ or bill,—

— says that his said writ and declaration [or, bill], by reason of anything in the said plea alleged, ought not to be quashed; because he says, etc. (u)

Where the plea was to the person,—

— says that notwithstanding anything in the said plea al-

(q) 1 Went. 60; Lib. Plac. 343.

(r) 1 Went. 39.

(s) Lib. Plac. 343; 1 Went. 39.

(t) Liber. Intrat.

(u) 2 Chitty, 569; 1 Arch. 309; East. Ent. 126 a.

leged, he, the said A. B., ought to be answered to his said declaration [*or, bill*]; because he says, etc. (x)

The *conclusion*, in most cases, is thus:

Where the plea was to the *writ* or *bill*,—

— wherefore he prays judgment, and that the said writ and declaration [*or, bill*] may be adjudged good and that the said C. D. may answer over, etc.

Where the plea was to the *person*,—

— wherefore he prays judgment, and that the said C. D. may answer over, etc. (y)

A *replication to a plea in bar* has this commencement:

— says that by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against him, the said C. D.; because he says, etc.

This formula is commonly called *precludi non*.

The *conclusion* is thus:

In *debt*,—

— wherefore he prays judgment, and his debt aforesaid, together with his damages by him sustained, by reason of the detention thereof, to be adjudged to him.

In *covenant*,—

— wherefore he prays judgment, and his damages by him sustained, by reason of the said breach of covenant, to be adjudged to him.

In *trespass*,—

— wherefore he prays judgment, and his damages by him sustained, by reason of the committing of the said trespasses, to be adjudged to him.

In *trespass on the case* — *in assumpsit*,—

— wherefore he prays judgment, and his damages by him sustained, by reason of the not performing of the said several promises and undertakings, to be adjudged to him.

In *trespass on the case* — *in general*,—

— wherefore he prays judgment, and his damages by him sustained, by reason of the committing of the said several grievances, to be adjudged to him.

And so, in all *other actions*, the replication concludes with a prayer of judgment for damages, or other appropriate redress, according to the nature of the action. (z)

(x) 1 Went. 42; 1 Arch. 309.

(y) 1 Went. 43, 45, 54; 1 Arch. 309; Rast. Ent. 126 a. As to the cases in which the *conclusion* should be different, see 2 Saund. 211, note 3; Medina v. Stoughton, Lord Ray. 594; Co. Ent. 160 a; Lil. Ent. 123; Lib. Plac. 1.

(z) See the forms, 2 Chitty, 615, 628, 630, 641; 1 Arch. 410, 442.

With respect to *pleading subsequent to the replication*, it will be sufficient to observe, in general, that those on the part of the defendant follow the same form of *commencement* and *conclusion* as the plea; those on the part of the plaintiff the same as the replication.

§ 209. These forms are subject to the following variations.—First, with respect to *pleas in abatement*. Matters of abatement, in general, only render the writ *abatable* upon plea; but there are others, such as the death of the plaintiff or defendant before verdict or judgment by default, that are said to abate it *de facto*; that is, by their own immediate effect, and before plea; the only use of the plea in such cases being to give the court notice of the fact. (a) Where the writ is merely *abatable*, the forms of *conclusion* above given are to be observed; but when abated *de facto*, the *conclusion* must pray “whether the court will farther proceed;” for the writ being already and *ipso facto* abated, it would be improper to pray “that it may be quashed.” (b)

Again, when a plea in bar is pleaded *puis darreign continuance*, (c) it has, instead of the ordinary *actio non*, a *commencement* and *conclusion* of *actio non ulterius*, as in the example *supra*, § 77.¹

So if a plea in bar be found on any matter arising *after the commencement of the action*, though it be not pleaded *after a previous plea*, and therefore not *puis darreign continuance*, yet it pursues in that case also, in its *commencement* and *conclusion*, the same form of *actio non ulterius* instead of *actio non* generally. (d)

Again, all pleadings by way of *estoppel* have a *commencement* and *conclusion* peculiar to themselves. A *plea in estoppel* has the following *commencement*: “Says that the said A. B. ought not to be admitted to say” (stating the allegation to which the estoppel relates); and the following *conclusion*: “Wherefore he prays judgment if the said A. B. ought to be

(a) Bac. Ab., Abatement (K.), (G.), (F.); Com. Dig., Abatement (E. 17); 2 Saund. 210, n. 1.

(b) Com. Dig., Abatement (H. 33), (I. 12); 2 Saund. 210, n. 1; *Hallowes v. Lucy*, 3 Lev. 120.

(c) As to this kind of plea, see *supra*, p. 154.

(d) *Le Bret v. Papillon*, 4 East, 502; 2 Chitty, 431.

¹ *Gibson v. Bourland*, 13 Ill. App. 352.

admitted, against his own acknowledgment, by his deed aforesaid" (or otherwise according to the matter of the estoppel), "to say that" (stating the allegation to which the estoppel relates). (e) A *replication* by way of estoppel, to a plea either in abatement or bar, has this *commencement*: "Says that the said C. D. ought not to be admitted to plead the said plea by him above pleaded, because he says, etc." (f) Its *conclusion* in case of a plea in *abatement* is as follows: "Wherefore he prays judgment if the said C. D. ought to be admitted to his said plea, contrary to his own acknowledgment, etc., and that he may answer over, etc.;" (g) in case of a plea in *bar*, "wherefore he prays judgment if the said C. D. ought to be admitted, contrary to his own acknowledgment, etc., to plead that" (stating the allegation to which the estoppel relates). (h) *Rejoinders and subsequent pleadings* follow the forms of pleas and replications respectively. (i)

Again, if any pleading be intended to apply to *part* only of the matter adversely alleged, it must be qualified accordingly in its *commencement* and *conclusion*. (k)

Lastly, when, in an action of *debt on bond*, some matter is pleaded in bar tending to show that the plaintiff *never had any right of action*, and not matter *in discharge of a right once existing* (as, for example, when it is pleaded that the bond was void for some illegality), the plea in that case, instead of *actio non*, has the following *commencement*, commonly called *onerari non*: "says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says," etc. And the *conclusion* is thus: "Wherefore he prays judgment if he ought to be charged with the said debt, by virtue of the said supposed writing obligatory." (l)

While pleadings have thus, in general, their formal *commencements* and *conclusions*, (m) there is an exception (as already noticed) in the case of all such pleadings as *tender issue*. These, instead of the conclusion with a *prayer of judg-*

(e) 1 Arch. 202; Veale v. Warner, 1 Saund. 325.

(f) 2 Chitty, 590, 592.

(g) Ibid. 590.

(h) 2 Chitty, 592.

(i) Veale v. Warner, 1 Saund. 325.

(k) Weeks v. Peach, 1 Salk. 179. See the example *supra*, p. 312.

(l) Com. Dig., Pleader (E. 27); Brown v. Cornish, Salk. 516.

(m) See Appendix, note (71).

ment as in the above forms, conclude (in the case of the trial by jury) *to the country*; or (if a different mode of trial be proposed) with other appropriate formulæ, as explained under the second rule of the first section. (n) Pleadings which tender issue have, however, the formal *commencements*, with the exception of the *general issues*, which have neither formal commencement nor conclusion, in the sense to which the present rule refers.

§ 210. In general, a defect or impropriety in the commencement or conclusion of a pleading is ground for demurrer. (o)—But if the *commencement* pray the proper judgment, it seems to be sufficient, though judgment be prayed in an improper form in the *conclusion*. (p) And the converse case, as to a right prayer in the *conclusion*, with an improper *commencement*, has been decided the same way. (q) So, if judgment be simply prayed, without specifying *what* judgment, it is said to be sufficient, and it is laid down that the court will, in that case, *ex officio*, award the proper legal consequence. (r) It seems, however, that these relaxations from the rule do not apply to pleas in *abatement*; the court requiring greater strictness in these pleas with a view to discourage their use. (s)

It will be observed that the *commencement* and *conclusion* of a plea are in such form as to indicate the view in which it is pleaded, and to mark its object and tendency as being either to the jurisdiction, in suspension, in abatement or in bar. It is therefore held that the class and character of a plea depend upon these, its formular parts, which is ordinarily expressed by the maxim, *conclusio facit placitum*. (t)¹ Accordingly, if it commence and conclude as in bar, but contain matter sufficient only to abate the writ, it is a bad plea in

(n) *Supra*, p. 287.

(o) *Nowlan v. Geddes*, 1 East, 634; *Wilson v. Kemp*, 2 M. & S. 549; *Le Bret v. Papillon*, 4 East, 502; *Com. Dig.*, Pleader (E. 27); *Weeks v. Peach*, 1 Salk. 179; *Powell v. Fullerton*, 2 Bos. & Pul. 420.

(p) *Rep. Temp. Hard.* 345.

(q) *Fort.* 335.

(r) 1 Chitty, 445, 530; *Le Bret v. Papillon*, 4 East, 502; 1 Saund, 97 n. 1.

(s) *King v. Shakespeare*, 10 East, 63; *Attwood v. Davis*, 1 Barn. & Ald. 172. See Appendix, note (72).

(t) *Street v. Hopkinson*, *Rep. Temp. Hard.* 346.

¹ *Pitts' Sons' Mfg. Co. v. Com. Nat. Bank*, 121 Ill. 528.

bar and no plea in abatement. (u) And, on the other hand, it has been held that if a plea commence and conclude as in abatement and show matter in bar, it is a plea in abatement and not in bar. (x)

As the *commencement* and *conclusion* have this effect of defining the character of the *plea*, so they have the same tendency in the *replication* and *subsequent pleadings*. For example, they serve to show whether the pleading be intended as in confession and avoidance or estoppel; and whether intended to be pleaded to the whole or to part. From these considerations it is apparent that they are forms which, on the whole, materially tend to clearness and precision in pleading; and they have for that reason been considered under this section.

In connection with the rule last mentioned, and in a view to the same objects of clearness and precision, is established the following rule:

RULE IX.

§ 211. A pleading which is bad in part is bad altogether. (y)¹—

The meaning of this rule is that if in any material part of a pleading, or in reference to any of the material things which it undertakes to answer, the pleading be bad, though in other respects it be free from objection, the whole of it is open to demurrer; so that if the objection be good the whole pleading in question is overruled and judgment given accordingly. Thus, if in a declaration of *assumpsit* two different promises be alleged in two different counts, and the defendant plead in bar to both counts, conjointly, the statute of limitations, viz., that he did not promise within six years, and the plea be an insufficient answer as to one of the counts, but a good bar as to the other, the *whole plea* is bad and neither promise is sufficiently answered. (z)

(u) 1 East, 684; Wallis v. Savil, 1 Lutw. 41; 2 Saund. 209 d, n. 1. Per Littleton, J., 36 Hen. 6, 18.

(x) Godson v. Good, 6 Taunt. 587. See Appendix, note (73).

(y) Com. Dig., Pleader (E. 36), (F. 26); 1 Saund. 28, n. 2; Webb v. Martin, 1 Lev. 48; Rowe v. Tutte, Willes, 14; Drueman v. Hurst, 1 T. R. 40.

(z) Webb v. Martin, 1 Lev. 48.

¹ Rison v. Farr, 24 Ark. 161, 87 v. Trann, 27 Ala. 562, 63 Am. Dec. Am. Dec. 52; Ferrall v. Bradford, 2 778; Bradley v. Powers, 7 Cow. 330; Fla. 508, 50 Am. Dec. 293; Wittick Marsteller v. McLean, 7 Cranch, 159.

This rule seems to result from that which requires each pleading to have its proper formal commencement and conclusion. For, by those forms (it will be observed), the matter which any pleading contains is offered as an entire answer to the whole of that which last preceded. Thus, in the example above given, the defendant would allege, in the commencement of his plea, that the plaintiff "ought not to have or maintain his *action*," for the reason therein assigned; and therefore he would pray judgment, etc., as to the whole *action* in the conclusion. If, therefore, the answer be insufficient as to one count, it cannot avail as to the other; because, if taken as a plea to the latter only, the *commencement* and *conclusion* would be wrong. In this example there was but one plea, and consequently but one commencement and conclusion; but if the defendant had pleaded the statute in bar to the first count separately, and then pleaded it to the second count, with a new commencement and conclusion, thus making two pleas instead of one, the invalidity of one of these pleas could not have vitiated the other.

As the *declaration* contains no commencement or conclusion of the kind to which the last rule relates, so, on the other hand, the *declaration* does not fall within the rule now in question. Therefore, if a declaration be good in part, though bad as to another part relating to a distinct demand divisible from the rest, and the defendant demur to the whole, instead of confining his demurrer to the faulty part only, the court will give judgment for the plaintiff. (a)

(a) 1 Saund. 286, note 9; Bac. Ab., Pleas, etc. (B.) 6; Cutforthay v. Taylor, Raym. 836; Judin v. Samuel, 1 New Rep. 43; Benbridge v. Day, 1 Salk. 218; Powdick v. Lyon, 11 East, 565.

CHAPTER X.

(ORIGINAL SECTION VI.)

OF RULES WHICH TEND TO PREVENT PROLIXITY AND DELAY IN PLEADING.

RULE I.

§ 211. There must be no departure in pleading. (b)¹—

A departure takes place when, in any pleading, the party deserts the ground that he took in his last antecedent pleading and resorts to another. (c)²

A departure obviously can never take place till the *replication*.

Of departure in the *replication* the following is an example: In *assumpsit* the plaintiffs, as executors, declared on several promises alleged to have been *made to the testator* in his lifetime. The defendant pleaded that she did not promise within six years before the obtaining of the original writ of the plaintiffs. The plaintiffs replied that, within six years before the obtaining of the original writ, the letters testamentary were granted to them, whereby the action accrued *to them, the said plaintiffs*, within six years. The court held this to be a departure; as in the declaration they had laid promises to *the testator*, but in the replication alleged the right of action

(b) Co. Litt. 304 a; 2 Saund. 84; Dudlow v. Watchorn, 16 East, 89; Tolpitt v. Wells, 1 M. & S. 395; and see the numerous authorities collected in Com. Dig., Pleader (F. 7), (F. 11); Bac. Ab., Pleas, etc. (L.); Vin. Ab., tit. Departure; 1 Arch. 247, 253. See Appendix, note (74).

(c) Co. Litt. 304 a; 2 Saund. 84, n. 1.

¹ A departure in a replication is when it does not support the declaration. Libby v. Brown, 4 Pick. 137. As sustaining the rule see Beard v. Hand, 68 Ind. 183; Munro v. Alaire, 2 Caines, 320; Prince v. Brunatte, 1 Bing. N. C. 435. Tindal, C. J., in Smith v. Nicolls, 5 Bing. N. C. 208, 7 Scott, 147, thus lays down a test of departure: "That which is a depart-

ure in pleading is a variance in evidence; and if the evidence in support of the replication would sustain the allegation in the declaration there is no departure." See, also, Brine v. Gt. West. Ry. Co., 2 Best & Smith, 402, Ames' Cases, 224.

² Salt Lake City Nat. Bank v. Hendrickson, 40 N. J. L. 52; Wilson v. Johnson (N. J.), 29 Atl. Rep. 419.

to accrue to *themselves as executors*. (d) They ought to have laid promises to themselves, as executors, in the declaration, if they meant to put their action on this ground.¹

§ 213. **Departure in the rejoinder.**— But a departure does not occur so frequently in the replication as in the *rejoinder*.²

In debt on a bond conditioned to perform an award so that the same were delivered to the defendant by a certain time, the defendant pleaded that the arbitrators *did not make any award*. The plaintiff replied that the arbitrators did make an award to such an effect and that the same was tendered by the proper time. The defendant rejoined *that the award was not so tendered*. On demurrer it was objected that the rejoinder was a departure from the plea in bar; “for, in the plea in bar, the defendant says that the arbitrators made no award, and now, in his rejoinder, he has implicitly confessed that the arbitrators have made an award, but says that it was not tendered according to the condition, which is a plain departure, for it is one thing not to make an award, and another thing not to tender it when made. And although both these things are necessary, by the condition of the bond, to bind the defendant to perform the award, yet the defendant ought only to rely upon one or the other by itself,” etc., “but if the truth had been that, although the award was made, yet it was not tendered according to the condition, the defendant should have pleaded so at first in his plea,” etc. And the court gave judgment accordingly. (e)³ So in debt on a bond conditioned to keep the plaintiffs harmless and indemnified from all suits, etc., of one Thomas Cook, the defendants pleaded *that they had kept the plaintiffs harmless*, (f) etc. The plaintiffs replied that Cook sued them, and so the defendant had not kept them

(d) *Hickman v. Walker*, Willea, 27.

(e) *Roberts v. Mariett*, 2 Saund. 188.

(f) This plea was bad for not showing *how* they had kept harmless (1 Saund. 117, n. 1), *supra*, p. —, but the court held the fault cured by pleading over. *Vide supra*, p. 222.

¹ In *Bartlett v. Wells*, 1 Best & Smith, 836, Ames' Cases, 222, the declaration was on a contract for money payable for goods supplied to the defendant, which was answered, after which the plaintiff sought to put the plea aside by replying a tort. This was held a departure, the nature of the cause of action being changed.

² See *Sterns v. Patterson*, 14 Johns. 182; *Burr v. Baldwin*, 2 Wend. 590; *Dutton v. Holden*, 4 id. 643.

³ See, also, *Fisher v. Pimbley*, 11 East, 183, Ames' Cases, 215; *Allen v. Watson*, 16 Johns. 203.

harmless, etc. The defendants rejoined *that they had not any notice of the damnification*. And the court held, first, that the matter of the rejoinder was bad, as the plaintiffs were not bound to give notice; and secondly, that the rejoinder was a departure from the plea in bar; "for in the bar the defendants plead that they have saved harmless the plaintiffs, and in the rejoinder confess that they have not saved harmless, but they had not notice of the damnification, which is a plain departure." (g) So in debt on a bond conditioned to perform the covenants in an indenture of lease, one of which was that the lessee, at every felling of wood, would make a fence, the defendant pleaded *that he had not felled any wood*, etc. The plaintiff replied that he felled two acres of wood, but made no fence. The defendant rejoined *that he did make a fence*; this was adjudged a departure. (h)

These, it will be observed, are cases in which the party deserts the ground, in point of *fact*, that he had first taken. But it is also a departure if he puts the same facts on a new ground in point of *law*; as if he relies on the effect of the common law in his declaration, and on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoinder. Thus, where the plaintiff declared in covenant on an indenture of apprenticeship, by which the defendant was to serve him for seven years, and assigned, as breach of covenant, that the defendant departed within the seven years, and the defendant pleaded infancy, to which the plaintiff replied that, by the custom of London, infants may bind themselves apprentices, this was considered as a departure. (i) Again, in trespass, the defendant made title to the premises, pleading a *demise for fifty years* made by the college of R. The plaintiff replied that there was another prior lease of the same premises, which had been assigned to the defendant, and which was unexpired at the time of making the said lease for fifty years; and alleged a proviso in the act of 31 Hen. 8, ch. 13, avoiding all leases by the colleges to which that act relates, made under such circumstances as the lease last mentioned. The defendant in his rejoinder pleaded an-

(g) Cutler v. Southern, 1 Saund. 116.

(h) Dyer, 253 b.

(i) Mole v. Wallis, 1 Lev. 51.

other proviso in the statute, which allowed such leases to be good *for twenty-one* years if made to the same person, etc.; and that, by virtue thereof, the demise stated in his plea was available for twenty-one years at least. The judges held the rejoinder to be a departure from the plea; "for, in the bar, he pleads a lease of fifty years, and in the rejoinder he concludes upon a lease for twenty-one years," etc. And they observed that "the defendant might have shown the statute, and the whole matter, at first." (k)

To show more distinctly the nature of a departure, it may be useful, on the other hand, to give some examples of cases that have been held *not* to fall within that objection.

In debt on a bond conditioned to perform covenants, one of which was that the defendant should account for all sums of money that he should receive, the defendant pleaded performance. The plaintiff replied that £26 came to his hands, for which he had not accounted. The defendant rejoined that he accounted *modo sequente*, viz., that certain malefactors broke into his counting-house and stole it, wherewith he acquainted the plaintiff. And it was argued on demurrer "that the rejoinder is a departure; for fulfilling a covenant to account cannot be intended but by actual accounting, whereas the rejoinder does not show an account, but an excuse for not accounting." But the court held that showing he was robbed is giving an account, and therefore there was no departure. (l) So, in debt on a bond conditioned to indemnify the plaintiff from all tonnage of certain coals due to W. B., the defendant pleaded *non damnificatus*; to which the plaintiff replied that for £5 of tonnage of coals due to W. B. his barge was distrained; and the defendant rejoined that *no tonnage was due* to W. B. for the coals. To this the plaintiff demurred, "supposing the rejoinder to be a departure from the plea; for the defendant having pleaded generally that the plaintiff was not damnified, and the plaintiff having assigned a breach, the matter of the rejoinder is only by way of excuse, confessing and avoiding the breach; which ought to have been done at first, and not after a general plea of indemnity. On the other side it was insisted that it was not necessary for the defendant to set out all his case at first; and it

(k) Fulmerston v. Steward, Plowd. 102; Dyer, 102 b, S. C.

(l) Vere v. Smith, 2 Lev. 5; 1 Vent. 121, S. C.

suffices that his bar is supported and strengthened by his rejoinder. And of this opinion was the court." (*m*) Again, in an action of trespass on the case for illegally taking toll, the plaintiff in his declaration set forth a charter of 26 Hen. 6, discharging him from toll. The defendant pleaded a statute resuming the liberties granted by Hen. 6. The plaintiff replied that by the statute 4 Hen. 7, such liberties were revived. And this was held to be no departure. (*n*) So, in all cases where the variance between the former and the latter pleading is *on a point not material*, there is no departure. Thus, in *assumpsit*, if the declaration, in a case where the time is not material, (*o*) state a promise to have been made on a given day, *ten years ago*, and the defendant plead that he did not promise within six years, the plaintiff may reply that the defendant *did promise within six years*, without a departure; (*p*) because the time laid in the declaration was immaterial.¹

§ 214. Object of this rule.— The rule against departure is evidently necessary to prevent the retardation of the issue. For, while the parties are respectively confined to the grounds they have first taken in their declaration and plea, the process of pleading will, as formerly demonstrated, exhaust, after a few alternations of statement, the whole facts involved in the

(*m*) Bac. Ab., Pleas, etc., p. 452 (5th ed.); *Owen v. Reynolds*, Fort. 341, S. O.

(*n*) *Wood v. Hawkshead*, Yelv. 13.

(*o*) *Vide supra*, p. 334.

(*p*) *Lee v. Rogers*, 1 Lev. 110.

¹ A departure must be in something material. *Gledstane v. Hewitt*, 1 Cromp. & J. 565, Ames' Cases, 218. In debt on an appeal bond the plaintiffs described themselves in the writ as "executors of," etc.; in the declaration, after reciting the writ, they called themselves "the said plaintiffs;" in the replication they were styled "executors of," etc.; and in the demurrer they again styled themselves "the said plaintiffs." This was said to be no departure, the word "executors" in the writ being treated as superfluous description. *Sasscer v. Walker's Ex'rs*, 5 Gill & J. 102, 25 Am. Dec. 272. Where the gist of the declaration was wrongful arrest and

imprisonment, and the replication stated facts which showed that, notwithstanding the color of legal process set up by the plea, the arrest and imprisonment were unlawful and tortious, this was no departure. *Breck v. Blanchard*, 22 N. H. 303. See, also, *Matthews v. Hamblin*, 28 Miss. 611; *Legg v. Evans*, 6 M. & W. 36, Ames' Cases, 220.

Advantage may be taken of departure by general demurrer. *Bartlett v. Wells*, 1 Best & Smith, 836; *Brine v. Gt. West Ry. Co.*, 2 id. 402; *Andrus v. Waring*, 20 Johns. 153; *Pease v. McKusick*, 25 Me. 75; *Keag v. Goodwin*, 16 Mass. 1.

cause, and thereby develop the question in dispute. (q) But if a new ground be taken in any part of the series, a new state of facts is introduced, and the result is consequently postponed. Besides, if one departure were allowed, the parties might on the same principle shift their ground as often as they pleased; and an almost indefinite length of altercation might in some cases be the consequence. (r)

RULE II.

✓ § 215. Where a plea amounts to the general issue it should be so pleaded. (s) —

It has been explained in a former part of the work that in most actions there is an appropriate form of plea called the *general issue*, fixed by ancient usage as the proper method of traversing the declaration, when the pleader means to deny the whole or the principal part of its allegations. (t) The meaning of the present rule is that if, instead of traversing the declaration in this form, the party pleads in a more special way matter which is constructively and in effect the same as the general issue, such plea will be bad; and the general issue ought to be substituted.¹

Thus, to a declaration in trespass for entering the plaintiff's garden, the defendant pleaded *that the plaintiff had no such garden*. This was ruled to be "no plea; for it amounts to nothing more than *not guilty*; for if he had no such garden, then the defendant is not guilty." So the defendant withdrew his plea, and said *not guilty*. (u) So, in trespass for depasturing the plaintiff's herbage, *non depascit herbas* is no plea; it should be *not guilty*. (x) So, in debt for the price of a horse sold, *that the defendant did not buy* is no plea, for it amounts to *nil debet*. (y) Again, in trespass for entering the plaintiff's

(q) *Supra*, p. 150-154.

(r) *Vide* 2 Saund. 84 a, n. 1.

(s) Co. Litt. 308 b; Doct. and Stud. 271, 272; Com. Dig., Pleader (E. 14); Bac. Ab., Pleas, etc., pp. 370-376, 5th ed.; 10 Hen. 6, 16; 23 Hen. 6, 37; *Holler v. Bush*, Salk. 394; *Birch v. Wilson*, 2 Mod. 277; *Lynnet v. Wood*, Cro. Car. 157; *Warner v. Wainsford*, Hob. 127; 12 Mod. 537; *Saunders's Case*, id. 513, 514.

(t) *Supra*, p. 229.

(u) 10 Hen. 6, 16.

(x) Doct. Pl. 42, cites 23 Hen. 6, 37.

(y) Vin. Ab., Certainty in Pleadings (A. 15), cites Bro. Traverse, etc., pl. 275; 22 Edw. 4, 29.

¹ As we have seen, this should be *Hayes*, 46 Ill. 155; *Wadhams v. Swan*, taken advantage of by special de- 109 id. 54. See Motion to Strike Out murrer or motion. *Cushman v.*

house and keeping possession thereof for a certain time, the defendant pleaded that J. S. was seized in fee thereof, and being so seized gave license to the defendant to enter into and possess the house, till he should give him notice to leave it; that thereupon the defendant entered and kept the house for the time mentioned in the declaration, and had not any notice to leave it, all the time. The plaintiff demurred specially, on the ground that this plea amounted to the general issue, *not guilty*; and the court gave judgment on that ground for the plaintiff. (2) So, in an action of trover for divers loads of corn, the defendant in his plea entitled himself to them as tithes severed. The plaintiff demurred specially, on the ground that the plea "amounted but to *not guilty*," and the court gave judgment for the plaintiff. (a) So, in trespass for breaking and entering the plaintiff's close, if the defendant plead a demise to him by the plaintiff, by virtue whereof he, the defendant, entered and was possessed, this is bad, as amounting to the general issue, *not guilty*. (b) So, in debt on a bond, the defendant, by his plea, confessed the bond, but said that it was executed to another person, and not to the plaintiff; this was bad, as amounting to *non est factum*. (c)

These examples show that a special plea thus improperly substituted for the general issue may be sometimes in a *negative*, sometimes in an *affirmative* form. When in the *negative* its *argumentativeness* (d) will often serve as an additional test of its faulty quality. Thus, the plea in the first example, "that the plaintiff had no such garden," is evidently but an argumentative allegation that the defendant did not commit, because he *could* not have committed the trespass. This, however, does not universally hold; for in the second and third examples the allegations that the defendant "did not depasture," and "did not buy," seem to be in as direct a form of denial as that of *not guilty*. If the plea be in the *affirmative*, the following considerations will always tend to detect the improper construction: If a good plea, it must (as formerly shown) be taken either as a traverse or as in confession and

(2) *Saunders's Case*, 12 Mod. 513, 514.

(a) *Lynnett v. Wood*, Cro. Car. 157.

(b) *Jaques' Case*, Stil. 355; *Hallett v. Byrt*, 5 Mod. 253.

(c) *Gifford v. Perkins*, 1 Sid. 450; 1 Vent. 77, S. C.

(d) See the rule against argumentativeness, *supra*, p. 396.

avoidance. (e) Now, taken as a traverse, such a plea is clearly open to the objection of *argumentativeness*; for two affirmatives make an argumentative issue. (f) Thus, in the fourth example, the allegations show that the house in question was the house of J. S., and they therefore deny argumentatively that it was the house of the plaintiff, as stated in the declaration. On the other hand, if a plea of this kind be intended by way of confession and avoidance, it is bad *for want of color*, (g) for it admits no apparent right in the plaintiff. Thus, in the same example, if it be true that J. S. was seized in fee and gave license to the defendant to enter, who entered accordingly, this excludes all title of possession in the plaintiff, and without such title he has no color to maintain an action of trespass. (h) So in the example where the defendant pleads the plaintiff's own demise, the same observation applies; for if the plaintiff demised to the defendant, who entered accordingly, the plaintiff would then cease to have any title of possession, and he consequently has no color to support an action of trespass.

The fault of *wanting color* being in this manner connected with that of *amounting to the general issue*, it is accordingly held that a plea will be saved from the latter fault where *express color* is given. (i) Thus, in the example of express color given, in a former part of this work, (k) the plea is cured, by the fictitious color of title there given to the plaintiff, of the objection to which it would otherwise be subject, that it amounts to *not guilty*. So, where sufficient *implied color* is given, a plea will never be open to this kind of objection. And it is farther to be observed, that, where sufficient implied color is given, the plea will be equally clear of this objection, even though it consist of matter which *might, by a relaxation of practice, be given in evidence under the general issue*. The relaxation here referred to is that formerly noticed, by which defendants are allowed, in certain actions, to prove,

(e) *Vide supra*, pp. 218, 219.

(f) *Vide supra*, p. 268.

(g) *Vide supra*, p. 266.

(h) See *Holler v. Bush*, Salk. 394.

(i) *Anon.*, 12 Mod. 537; *Saunders' Case*, 513, 514; *Lynnett v. Wood*, Cro. Car. 157; *Birch v. Wilson*, 2 Mod. 274.

(k) *Supra*, pp. 270, 271.

under this issue, matters in the nature of confession and avoidance, as, for example, in *assumpsit*, a release or payment. (l) In such cases the plaintiff (as formerly stated), (m) though allowed, is not *obliged*, to plead *non assumpsit*, but may, if he pleases, plead specially the payment or release; and if he does, such plea is not open to the objection that it amounts to the general issue. (n)

It is said that the court is not bound to allow this objection, but that it is in its discretion to allow a special plea amounting to the general issue, if it involve such matter of law as might be unfit for the decision of a jury. (o) It is also said that, as the court has such discretion, the proper method of taking advantage of this fault is not by *demurrer*, but by motion to the court to set aside the plea and enter the general issue instead of it. (p) It appears from the books, however, that the objection has frequently been allowed on demurrer.

As a plea amounting to the general issue is usually open also to the objection of being *argumentative*, or that of *wanting color*, we sometimes find the rule in question discussed as if it were founded entirely in a view to those objections. This, however, does not seem to be a sufficiently wide foundation for the rule; for there are instances of pleas which are faulty, as amounting to the general issue, which yet do not (as already observed) seem fairly open to the objection of argumentativeness, (q) and which, on the other hand, being of the negative kind or by way of traverse, require no color. Besides, there is express authority for holding that the true object of this rule is *to avoid prolixity*, and that it is therefore properly classed under the present section. For it is laid down that "the reason of pressing a general issue is not for insufficiency of the plea, but not to make long records when there is no cause." (r)

(l) *Supra*, p. 237.

(m) *Supra*, p. 240.

(n) *Holler v. Bush*, Salk. 394; *Hussey v. Jacob*, Carth. 355

(o) *Bac. Ab.*, Pleas, etc., p. 374, 5th ed.; *Birch v. Wilson*, 2 Mod. 274.

(p) *Warner v. Wainsford*, Hob. 127; *Ward v. Blunt's Case*, 1 Leon. 173.

(q) *Supra*, p. 409.

(r) *Warner v. Wainsford*, Hob. 127. See also *Com. Dig.*, Pleading (E. 12).

RULE III.

§ 216. Surplusage is to be avoided. (s)¹—

Surplusage is here taken in its large sense, as including *unnecessary matter* of whatever description. (t)² To combine with the requisite certainty and precision the greatest possible *brevity* is now justly considered as the perfection of pleading. This principle, however, has not been kept uniformly in view at every era of the science. For, although it appears to have prevailed at the earliest periods, it seems to have been nearly forgotten during a subsequent interval of our legal history; (u) and it is to the wisdom of modern judges that it owes its revival and restoration.

1. The rule as to avoiding surplusage may be considered first as prescribing the omission of matter *wholly foreign*. An example of the violation of the rule, in this sense, occurs when a plaintiff, suing a defendant upon one of the covenants in a long deed, sets out in his declaration not only the covenant on which he sues, but all the other covenants, though relating to matters wholly irrelevant to the cause. (x)

2. The rule also prescribes the omission of matter which though not wholly foreign, *does not require to be stated*. Any matters will fall within this description which, under the va-

(s) *Bristow v. Wright*, Doug. 667; 1 *Smith*, L. C. 1417; 1 *Saund.* 233, n. 2; *Yates v. Carlisle*, 1 *Black.* 270.

(t) In its more strict and confined meaning it imports matter wholly foreign and irrelevant.

(u) See the remarks of Sir M. Hale, *Hist. of Com. Law*, chs. vii, viii.

(x) *Dundas v. Lord Weymouth*, Cowp. 665; *Price v. Fletcher*, id. 727; *Phillips v. Fielding*, 2 *H. Bl.* 131.

¹ The maxim of the law is "*Utile, per inutile, non vitatur*." *Broom*, Max. 627; *Dugger v. Oglesby*, 3 *Ill. App.* 94; *Shipherd v. Field*, 70 *Ill.* 438; *Goff v. T., St. L. & R. G. Ry.*, 28 *Ill. App.* 529; *Knoebel v. Kircher*, 33 *Ill.* 308. Descriptive words, though unnecessary, may be traversed, and must be proved. *Gridley v. City of Bloomington*, 68 *Ill.* 47; *Katz v. Moessinger*, 7 *Ill. App.* 536; *Leke's Case*, *Dyer*, 365, 2 *Saund.* 207a, n.; *Dickensheets v. Kauffman*, 28 *Ind.* 251. See further, *Cahill v. Palmer*, 17 *Abb. Pr.* 196, 45 *N. Y.* 478; *Rollett v. Heiman*, 120 *Ind.* 511; *Northrup v. McGee*, 20 *Ill. App.* 108.

² The term "irrelevancy," as used in the code, has been held to apply either to prolixity or needless details of material matter, or to something out of which no cause of action or defense could arise between the parties in the particular suit. *Lee Bank v. Kitching*, 11 *Abb. Pr.* 435. See *Smith v. Holmes*, 54 *Mich.* 105; *Hagerty v. Andrews*, 94 *N. Y.* 195; *Gampbell v. Taylor*, 3 *Utah*, 325.

rious rules enumerated in a former section as tending to limit or qualify the degree of certainty, (y) it is unnecessary to allege; for example, matter of mere *evidence*, matter of *law*, or other *things which the court officially notices*, matter *coming more properly from the other side*, matter *necessarily implied*, etc.¹

3. The rule prescribes, generally, the cultivation of *brevity* or avoidance of unnecessary prolixity in the *manner of statement*. A terse style of allegation involving a strict retrenchment, even of unnecessary *words*, is the aim of the best practitioners in pleading, and is considered as indicative of a good school.²

✓ § 217. **Surplusage cannot be taken advantage of by demurrer.**—Surplusage, however, is not a subject for *demurrer*; the maxim being that *utile, per inutile, non vitatur*. (z)³ But when any flagrant fault of this kind occurs and is brought to the notice of the court, it is visited with the censure of the judges. (a) They have also in such cases, on motion, referred the pleadings to the master that he might strike out such matter as is redundant, and capable of being omitted, without injury to the material averments, and in a clear case will themselves direct such matter to be struck out. And the party offending will sometimes have to pay the costs of the application. (b)⁴

This is not the only danger arising from surplusage.

(y) *Vide supra*, pp. 380-380.

(z) Co. Litt. 308 b.

(a) *Yates v. Carlisle*, 1 Black. 270; *Price v. Fletcher*, Cowp. 727.

(b) *Price v. Fletcher*, Cowp. 727; *Bristow v. Wright*, Doug. 667; 1 Tidd. 552, 4th ed.; *Nichol v. Wilton*, 1 Chitty Rep. 449, 450.

¹ *Marie v. Garrison*, 83 N. Y. 14.

² "I have observed that correctness in pleading and real law-knowledge keep pace with each other." Judge Smith, *Smith's Rep. N. H.* 525.

³ See *supra*, note 1, p. 411.

⁴ See *Lowry v. Kinsey*, 26 Ill. App. 809; *Bailey v. Lindsay*, 35 Mo. App. 675; *Wickersham v. Crittenden*, 93 Cal. 17; *Terry v. Wenderoth*, 28 W. N. C. 517; *Murphy v. McGraw*, 74 Mich. 818; *Cannon v. Lindsey*, 85 Ala. 198; 7 Am. St. Rep. 38; *Russell*

v. Rogers, 15 Wend. 351; *Petty v. Trustees*, etc., 95 Ind. 280; *Ashe v. Gray*, 90 N. C. 137; *Williams v. Sexton*, 19 Wis. 42; *Russell v. Chambers*, 81 Minn. 54. While mere surplusage will not vitiate, yet where some statement on the subject is necessary, and it cannot be wholly rejected, a variance or failure to prove as laid is fatal. *Lake E. & W. R. R. Co. v. Christison*, 39 Ill. App. 495; *Sabine & E. T. R. Co. v. Broussard*, 79 Tex. 617.

Though traverse cannot be taken (as elsewhere shown) on an immaterial allegation, (c) yet it often happens that when material matter is alleged with an unnecessary detail of circumstances, the essential and non-essential parts of the statement are in their nature so connected as to be incapable of separation, and the opposite party is therefore entitled to include, under his traverse, the whole matter alleged. (d) The consequence evidently is, that the party who has pleaded with such unnecessary particularity has to sustain an increased burden of proof, and incurs greater danger of failure at the trial.¹

Most of the principal rules of pleading have now been classed in reference to certain common objects which each class or set of rules is conceived to contemplate; and have been explained and illustrated in their connection with these objects and with each other. But there still remain certain rules, also of a principal or primary character, which have been found not to be reducible within this principle of arrangement, being, in respect of their objects, of a miscellaneous and unconnected kind. These will form the subject of the following section.

(c) *Supra*, p. 294.

(d) *Vide supra*, pp. 297, 298.

¹ *Gridley v. City of Bloomington*, 68 Ill. 47.

CHAPTER XI.

(ORIGINAL SECTION VII.)

OF CERTAIN MISCELLANEOUS RULES

which relate either to the *declaration*, the *plea* or *pleadings* in general, and are considered in that order.

RULE I.

✓ § 218. The declaration should commence with a recital of the original writ. (e)¹—

The commencement of the declaration, in *personal* actions, generally consists of a *short recital of the original writ*. Accordingly, where the writ directs the sheriff to *summon* the defendant, as in debt and covenant, (f) the declaration begins, "C. D. was *summoned* to answer A. B. of a plea," etc. (g) On the other hand, where by the writ the defendant is required to be *put by gages and safe pledges*, as in trespass, and trespass on the case, (h) the commencement is, "C. D. was *attached* to answer A. B. of a plea," etc. (i) The declaration then proceeds farther to recite the writ by showing the nature of the particular requisition or exigency of that instrument; as, for example (in debt), "of a plea that he render to the said A. B. the sum of — pounds," etc. For farther example the reader may be referred to the different specimens of declaration given in the first chapter. From these it will appear that in debt, covenant, detinue and trespass, nearly the whole original writ is recited, but not in trespass on the case. The course was formerly the same in the latter action also; but as this led to an inconvenient prolixity, it was by rule of court (k) provided that in that and some other actions it shall be suffi-

(e) Com. Dig., Pleader (C. 12).

(f) *Supra*, pp. 73-9.

(g) *Vide supra*, pp. 114, 115.

(h) *Vide supra*, pp. 83, 89.

(i) *Vide supra*, pp. 117, 120.

(k) 1 Tidd, 309 (4th ed.); 1 Saund. 318, n. 3.

¹ *Yatter v. Pitkin* (Vt.), 29 Atl. Rep. 370; *Reed v. Lane*, 61 Vt. 481.

cient to mention generally the nature of the action; thus, "a plea of trespass upon the case," etc., and such summary form has accordingly been since used.

In *real* and *mixed* actions the writ is, in general, not so formally recited. Thus, in the writ of right, the count begins, "A. B. demands against C. D.," etc.; and the case is the same in formedon and dower. (*l*) In general, however, it will be observed that this commencement comprises a repetition of the tenor of the writ, and in some actions, as in *quare impedit*, (*m*) the writ is as formally recited as in actions personal.

The recital of the writ is a form which the declaration has borrowed from the style in which it was entered on *record*; for the declaration itself, when actually pronounced in court, began, in general, with the words *Ceo vous monstrie*, etc. (*n*)

The recital of the writ is not considered as an essential part of the declaration; and though the recital be erroneous the declaration is not therefore bad. (*o*)

The rule under consideration, of course, does not apply where the proceeding is by *bill*; but in that case, also, the declaration has its proper formal commencement.

The declaration by bill commences with the following formula: "A. B. complains of C. D.," etc., and in the king's bench proceeds, in general, to allege that the defendant is "in the custody of the marshal of the marshalsea of our lord the now king before the king himself," (*p*) viz.: that he is a prisoner of the court; but in case of an action against an attorney or officer of the court, it alleges the defendant to be such attorney or officer, without stating him to be in custody, etc. In the common pleas the capacity of the defendant, as attorney or officer, is in a similar manner alleged; and in the exchequer the declaration commences by describing the plaintiff as "a debtor to our sovereign lord the king." Of the meaning of these different forms some explanation may be collected from the first chapter of this work, (*q*) but it will be found more copiously in treatises which profess to consider

(*l*) See the forms of these counts in the first chapter, *supra*, pp. 112, 113.

(*m*) *Supra*, p. 113.

(*n*) See Appendix, note (75).

(*o*) Com. Dig., Pleader (C. 12); 1 Saund. 318, n. 3; *Helliott v. Selby*, Salk. 701.

(*p*) Com. Dig., Pleader (C. 8). *Vide supra*, p. 132.

(*q*) *Vide supra*, pp. 127, 133.

at large the origin of the respective jurisdictions of the superior courts. (r)

RULE II.

§ 219. The declaration must be conformable to the original writ. (s)¹—

This is a rule of high antiquity, being laid down by Bracton, (t) who wrote in the reign of Henry III., a period at which the system of pleading was in a very rude and imperfect state. It may be exemplified as follows: In *detinue*, where the writ stated the value of the goods which were the subject of action to be 20*l.*, and the declaration alleged 40*l.*, the variance was, in an old case, considered as a ground for reversing the judgment upon writ of error. (u) And in *trespass*, where the writ charged the defendant with breaking the *close* of the plaintiff, and the declaration with breaking his *closes*, the decision was the same. (x)

The rule is to be taken, however, subject to this qualification: that the declaration in general may and does so far vary from the writ that it states the cause of action more *special*ly. (y) This the reader may see exemplified in the specimens of writs and declarations given in the first chapter, though it is more observable with respect to the writs of debt and covenant, etc., which are in a general form, than the writs of a special kind, such as trespass and trespass on the case.

Though it has been thought desirable to notice this rule, it is at the same time to be observed that it has lost much of its practical importance, as it can rarely now be enforced. For,

(r) And see the forms of commencement by original and by bill in the different courts given at large, 2 Chitty, 1-4; 1 Arch. 73.

(s) Com. Dig., Pleader (C. 13); Bac. Ab., Pleas, etc. (B.), 4; Co. Litt. 308 a; Bract. 431 a, 435 b.

(t) Bract., *ubi supra*.

(u) Young v. Watson, Cro. Eliz. 308.

(x) Edward v. Watkin, id. 185.

(y) Com. Dig., Abatement (G. 8); Pleader (C. 15); Co. Litt. 308 b.

¹ Dicey says that when a joinder is allowed the reason for the rule ceases, and it amounts to abolishing the form. Dicey on Parties, p. 64. You may not join under the code a cause of action upon a contract and one in tort. Smith v. E. Tenn., Va. & Ga. R. Co., 98 Ala. 154; Whilden & Sons v. Merchants' Bank, 64 id. 1; Louisville & N. R. R. v. Dancy, 97 id. 838. When a writ of attachment proceeds upon one theory the declaration or complaint must conform to the same. Wright v. Snedecor, 46 Ala. 92; Hambrick v. Wilkins, 65 Miss. 18, 7 Am. St. Rep. 631. See *ante*, p. 61, note. See Conforming to One Theory, and Departure.

if the declaration varied from the original, the only modes of objecting to the variance (unless the fault happened to appear by the recital in the commencement of the declaration) were by plea in abatement or by writ of error. (z) But by a change of practice explained in the first chapter, a plea in abatement in respect of such variance can now no longer be pleaded; (a) and, by the statutes of jeofails and amendments, the objection cannot now be taken by way of writ of error after verdict; nor, if the variance be in a matter of *form* only, can it be taken after judgment by confession, *nil dicit*, or *non sum informatus*. (b)¹ However, the effect of the rule is still felt in pleading; for its long and ancient observance had fixed the frame and language of the declaration in conformity with the original writ in each form of action; and, by a rule which has already been considered, to depart from the known and established tenor of pleadings is a fault; (c) consequently a declaration must still be framed in conformity with the language of the original writ appropriate to the form of action as much as when a variance from the writ actually sued out might have become the subject of a plea in abatement.

In proceedings by *bill*, the rule in question is of course inapplicable; yet, even in these, the declaration pursues the same forms of expression as if founded on an original writ in the same form of action. Thus the declaration in debt by bill is worded exactly in the same manner as the declaration in debt by original, (d) the formal commencement only excepted; and the case is the same in all other actions.

RULE III.

✓ § 220. The declaration should, in conclusion, lay damages and allege production of suit.²—

First, *the declaration must lay damages.*

In *personal* and *mixed* actions (e) the declaration must allege,

(x) 1 Saund. 318, n. 2.

(a) *Supra*, p. 142.

(b) 5 Geo. 1, ch. 13; 21 Jac. 1, ch. 18; 4 Ann., ch. 16. See 2 Tidd, 616, 4th ed.

(c) *Vide supra*, p. 388.

(d) *Vide supra*, pp. 115, 130.

(e) But *penal* actions are an exception.

¹ See *T. W. & W. Ry. v. McLaughlin*, 63 Ill. 389; *Wright v. Snedecor*, 46 Ala. 631.

² *Special damages* must be specially alleged. *Watkins v. Junker*, 4 Tex. Civ. App. 629; *Campbell v. Cook*, 80

in conclusion, that the injury is to the *damage* of the plaintiff, and must specify the amount of that damage. (f) In *personal* actions there is the distinction formerly explained between actions that *sound in damages* and those that do not; (g) but in either of these cases it is equally the practice to lay damages. There is, however, this difference: that in the former case damages are the main object of the suit, and are therefore always laid high enough to cover the whole demand; but in the latter, the liquidated debt or the chattel demanded being the main object, damages are claimed in respect of the *detention* only of such debt or chattel, and are therefore usually laid at a small sum.

The plaintiff cannot recover greater damages than he has laid in the conclusion of his declaration. (h)¹

In *real* actions no damages are to be laid, because in these the demand is specifically of the land withheld, and damages are in no degree the object of suit.

Secondly, *the declaration should also conclude with the production of suit.*

This applies to actions of all classes—real, personal and mixed.

In ancient times the plaintiff was required to establish the truth of his declaration in the first instance and before it was called into question upon the pleading by the simultaneous production of his *secta*; that is, a number of persons prepared to confirm his allegations. (i) The practice of thus producing

(f) Com. Dig., Pleader (C. 84); 10 Rep. 116 b; 117 a, b.

(g) *Vide supra*, p. 133.

(h) Com. Dig., Pleader (C. 84); Vin. Ab., Damages (R.); 10 Rep. 117 a, b.

(i) See Bract. 214 b. *Et inde statim producat* (i. e., after the declaration in an action of prohibition) *sectam sufficientem, duos ad minus, vel tres, vel plures, si possit.* Ibid. 410 a. "*Producit sectam* was proffering to the court the testimony of the witnesses or followers." Gilb. C. P. 48. See Appendix, note (76).

Tex. 630; Quincy Coal Co. v. Hood, 77 Ill. 75; Horne v. Sullivan, 88 id. 80. As to what are special damages, see Woodworth v. Woodburn, 20 Ill. 184; Roberts v. Graham, 6 Wall. 578; Ward v. Smith, 11 Price, 19; 1 Sutherland on Damages, 763.

¹ This allegation is called the *ad damnum* clause. If the declaration shows a claim of damages greater than the verdict, the omission of an *ad damnum* is immaterial. Burst v.

Wayne, 13 Ill. 599. After verdict the *ad damnum* may be increased by amendment to embrace the recovery. Brown v. Smith, 24 Ill. 196; Tomlins v. Erushaw, 112 id. 311. Or a *remittitur* may be entered for the excess above the sum alleged. Crews v. Lackland, 67 Mo. 619; White v. Cannadee, 25 Ark. 41. The amount claimed in the complaint or declaration governs the jurisdiction. Hamden v. Merwin, 54 Conn. 418.

a *secta* gave rise to the very ancient formula, almost invariably used at the conclusion of a declaration as entered on record, *et inde producit sectam*; (*k*) and, though the actual production has for many centuries fallen into disuse, the formula still remains. (*l*) Accordingly, except the count on a writ of right and in dower, all declarations constantly conclude thus: "And therefore he brings his suit," etc. The count on a writ of right did not, in ancient times, conclude with the ordinary production of suit, but with the following formula peculiar to itself: "*Et quod tale sit jus suum offert disrationare per corpus talis liberi hominis*," etc.; (*m*) and it concludes, at the present day, with an abbreviated translation of the same phrase: "And that such is his right, he offers," etc. The count in dower is an exception to the rule in question, and concludes without any production of suit — a peculiarity which appears always to have belonged to that action. (*n*)

We may take occasion to notice in this place that subjoined to the declaration, in proceedings by *bill*, there is an addition of the names of two persons, now fictitious ones, as *pledges for the prosecution of the suit*. (*o*) By the old law it was necessary that, before the sheriff executed the original writ, the plaintiff should give him security that he would pursue his claim. (*p*) This regulation seems to have been extended to proceedings by bill also; but in these proceedings the security would appear to have been given, not to the sheriff, but to the court itself, and the time for giving it was apparently that of filing the bill. Hence, the practice in question, of entering *pledges* at the foot of declarations by bill. These *pledges*, however, are now, in all cases, a mere matter of form, no such security being actually given in proceedings either by bill or original. (*q*)

(*k*) See the entries in the *Placitorum Abbreviatio*, *passim*, temp. Rich. 1, Ed. 2.

(*l*) As early as 7 Ed. 2, it had become a mere form; for it is said in a case reported of that year, *cest court* (i. e., the common pleas) *ne soeffre mye, la suite estre examine*. 7 Ed. 2, 242.

(*m*) Bract. 372 b. Glanville gives it thus: *Et hoc promptus sum probare per hunc liberum meum hominem*, etc. Glan. Lib. 2, ch. 3.

(*n*) Booth & Co. Ent., tit. Dower.

(*o*) *Vide* the example, p. 122.

(*p*) *Hussey v. More*, Cro. Jac. 414; 3 Bulst. 279, S. C.; Sel. Introd., xlviii. This practice is still indicated by the form of the original writs, which always contain the clause of *si te fecerit securum*. See the forms in the first chapter.

(*q*) See Appendix, note (77).

RULE IV.

§ 221. Pleas must be pleaded in due order. (r) —

The order of pleading, as established at the present day, is as follows:

Pleas —

1. To the jurisdiction of the court.
2. To the disability of the person { 1. Of plaintiff.
2. Of defendant.
3. To the count or declaration.
4. To the writ { 1. To the form of the writ. { 1. For matter apparent on the face of it.
2. For matter *dehors* the writ.
2. To the action of the writ.

5. To the action itself, in bar thereof. (s)¹

In this order the defendant may plead all these kinds of plea successively. Thus, he may first plead to the jurisdiction, and, upon demurrer and judgment of *respondeat ouster* thereon, (t) may resort to a plea to the disability of the person; and so to the end of the series.

But he cannot plead more than one plea of the same kind or degree. Thus, he cannot offer two successive pleas to the jurisdiction, or two to the disability of the person. (u)

So he cannot vary the order; for, by a plea of any of these kinds, he is taken to waive or renounce all pleas of a kind prior in the series.²

And if issue *in fact* be taken upon any plea, though of the dilatory class only, the judgment on such issue (as elsewhere explained) either terminates or (in case of a plea of suspension) suspends the action; (x) so that he is not at liberty, in that case, to resort to any other kind of plea.

(r) Co. Litt. 303 a; Longueville v. Thistleworth, Lord Ray. 970.

(s) Com. Dig., Abatement (C.); 1 Chitty, 425. See Appendix, note (78).

(t) As to this judgment, *vide supra*, p. 193.

(u) Com. Dig., Abatement (L 3); Bac. Ab., Abatement (O.).

(x) *Vide supra*, pp. 193, 194.

¹ See *Rex v. Gibson*, 8 East, 107, 1 Lead. Cr. Cas. 272; Gould's Plead., ch. 5, §§ 1-3; Hughes' Tech. of Law, 167. ² *Burchard v. Record* (Tex.), 17 S. W. Rep. 241; *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65. While the codes do not observe the common-

RULE V.

§ 222. Pleas must be pleaded with defense. (y)—

Defense here signifies a certain form of words by which the plea is introduced.

This form varies, in some degree, according to the nature of the action.

In the *writ of right*, where the demandant claims on *his seisin*, it is thus: "And the said C. D., by E. F., his attorney, comes and defends the right of the said A. B. and his seisin when, etc., and all, etc., and whatsoever, etc., and chiefly of the tenements aforesaid, with the appurtenances, as of fee and right, etc., and says;" and then the matter of the plea is stated. (z) In a writ of right, when the demandant claims on the seisin of *his ancestor*, it is thus: "And the said C. D., by E. F., his attorney, comes and defends the right of the said A. B., and the seisin of the said G. B. (the ancestor), when, etc., and all, etc., and whatsoever, etc., and chiefly of the tenements aforesaid, with the appurtenances, as of fee and right, etc., and says." (a)

In *formedon* the defense is: "And the said C. D., by E. F., his attorney, comes and defends his right when, etc., and says." (b)

The action of *dower* is an exception to the rule, and in this suit defense is not made. (c)

In *quare impedit* the defense is: "And the said C. D., by E. F., his attorney, comes and defends the wrong and injury when, etc., and says."

In *trespass*: "And the said C. D., by E. F., his attorney, comes and defends the force and injury when, etc., and says."

(y) Co. Litt. 127 b; *Tamplan v. Newsam*, Yelv. 210; *Hampson v. Bill*, 3 Lev. 240.

(z) 3 Bl. Com., Appendix, No. I, sec. 5.

(a) Booth, 94; Co. Ent. 181 b; 3 Chitty, 632.

(b) Booth, 148. *Defendit jus suum*, etc., is the Latin phrase: but this is ungrammatically put, as Blackstone conjectures, for *ejus*, and refers to the right of the demandant. See 3 Bl. Com. 297.

(c) Rast. Ent. 228.

law order of filing pleas, still the defendant cannot lie by and make one defense and then raise another which belonged to a former stage at common law. *Wells v. Patton*, 50 Kan. 732; *Douglas v. Phoenix Ins. Co.*, 138 N. Y. 209. A plea to juris-

diction after a demurrer and general denial is too late. *Meyer v. Sunol* (Tex.), 21 S. W. Rep. 995. It is discretionary with the court to allow pleas out of order. *Mex. Cent. Ry. v. Pinkney*, 149 U. S. 194.

In *other personal actions*: "And the said C. D., by E. F., his attorney, comes and defends the wrong and injury when, etc., and says." (*d*)

The word "comes" expresses the *appearance* of the defendant in court. It is taken from the style of the entry of the proceedings on the record, and formed no part of the *viva voce* pleading. It is, accordingly, not considered as in strictness constituting a part of the plea. (*e*)

The word "defends," as used in these formulæ, has not its popular sense. It imports *denial*, being derived from the law-Latin *defendere*, or the law-French *defendre* (both of which signified to *deny*; (*f*) and the effect of the expression is, that the defendant denies the right of the plaintiff or the force or wrong charged. (*g*) This denial, however, is mere matter of form; for the defense is used, not merely when the plea is by way of denial or traverse, but when by confession and avoidance also; and, even when the plea does deny, other words are employed for that purpose, as we have seen, besides those of the formal *defense*.¹

The *etc.*'s supply the place of words which were formerly inserted *at length*. In a personal action, for example, the form, if fully given, would be as follows: "And the said C. D., by E. F., his attorney, comes and defends the force" (or "wrong") "and injury when and where it shall behove him, and the damages and whatsoever else he ought to defend, and says." (*h*)²

At a time when this formula was more considered than it now is, particular effects were assigned to these, its different clauses. It was said that by defending "when and where it

(*d*) See examples of defense in the different pleas in the first chapter.

(*e*) 1 Chitty, 411; Salk. 544.

(*f*) See Appendix, note (79).

(*g*) See Appendix, note (80).

(*h*) Bac. Ab., Pleas, etc. (D.).

¹ The meaning of the word "defense" is often of great importance in the construction of statutes, and the distinction between its popular and technical legal meaning, as pointed out by the author, must be borne in mind. See *Stewart v. Travis*, 10 How. Pr. 148; *Coles v. Soulsby*, 21 Cal. 47;

United States v. Ordway, 30 Fed. Rep. 32; *Travis v. Barger*, 24 Barb. 615; *King v. Bell*, 18 Neb. 409; *Miller v. Martin*, 8 N. J. L. 201. The word "defense" has been held not to include matter of abatement. *Wilson v. Poole*, 33 Ind. 448.

² See 3 Cooley's Black. 297-8.

shall behove him," the defendant impliedly acknowledged the jurisdiction of the court, and by defending the "damages and whatsoever else he ought to defend," he in effect admitted the competency of the plaintiff to sue; that by the former words, therefore, he was excluded from proceeding to plead to the jurisdiction, and by the latter from pleading to the disability of the plaintiff. Hence arose a distinction between "full defense" and "half defense," the former being that in which all the clauses were inserted, the latter being abridged thus: "And the said C. D., by E. F., his attorney, comes and defends the force" (or "wrong") "and injury, and says." Half defense was used where the defendant intended to plead to the jurisdiction or in disability, and full defense in other cases.¹ All this doctrine, however, is now, in effect, superseded by the uniform practice of making defense with an etc., as in the forms first above given, it having been decided that such method will operate either as full defense or half defense, as the nature of the plea may require. (i)

Defense is used in almost all actions. It has been seen, however, that *dower* is an exception, and the case is the same with an *assise*; the form of commencing the plea in these actions being merely "comes and says," and not "comes and defends." (k)

Defense is used, too, in almost every description of pleas in those actions in which it obtains. (l)

This formula can perhaps be considered in no other light than as one of those verbal subtleties by which the science of pleading was, in many instances, anciently disgraced. It is at least difficult to discover in what solid view much consideration could be attached to the use of these technical words. (m) Yet they have been formerly held to be essential, (n) are still constantly used, and cannot in general with safety be omitted. (o)

(i) Co. Litt. 127 b; *Alexander v. Maurman*, Willes, 40; *Wilkes v. Williams*, 8 T. R. 688; 3 Saund. 209 c, n. 1; 1 Chitty, 418, 414.

(k) Booth, 118. In *scire facias* also, no defense is made. Bac. Ab., Pleas, etc. (D.).

(l) See the few exceptions noticed, 1 Chitty, 418.

(m) See Appendix, note (81).

(n) Co. Litt. 127 b; *Hampson v. Hill*, 3 Lev. 240.

(o) 1 Chitty, 412; 1 Arch. 162.

¹ See *McCormick Mfg. Co. v. Snell*, 23 Ill. App. 79.

RULE VI.

§ 223. Pleas in abatement must give the plaintiff a better writ or bill. (*p*)¹—

The meaning of this rule is that, in pleading a mistake of form in abatement of the writ or bill, the plea must at the same time *correct* the mistake so as to enable the plaintiff to avoid the same objection in framing his new writ or bill. (*q*) Thus, if a misnomer in the Christian name of the defendant be pleaded in abatement, the defendant must in such plea show what his true Christian name is, and even what is his true surname; (*r*) and this though the true surname be already stated in the declaration, lest the plaintiff should a second time be defeated by error in the name. For these pleas, as tending to delay justice, are not favorably considered in law, and the rule in question was adopted in a view to check the repetition of them.

This condition of requiring the defendant to give a better writ is often a criterion to distinguish whether a given matter should be pleaded in *abatement* or in *bar*. (*s*) The latter kind of plea, as impugning the right of action altogether, can of course give no better writ, for its effect is to deny that under any form of writ the plaintiff could recover in such action. If, therefore, a better writ can be given, this shows that the plea ought not to be in bar but in abatement.

It may also be laid down as a rule—that:

RULE VII.

§ 224. Dilatory pleas must be pleaded at a preliminary stage of the suit.—

For dilatory pleas are in general not allowable after *full*

(*p*) Com. Dig., Abatement (I. 1); *Evans v. Stevens*, 4 T. R. 227; *Mainwaring v. Murman*, 2 Bos. & Pul. 120; *Haworth v. Spraggs*, 8 T. R. 515.

(*q*) See Appendix, note (32).

(*r*) 8 T. R. 515.

(*s*) 1 Saund. 284, n. 4; *Evans v. Stevens*, 4 T. R. 227.

¹ *Am. Exp. Co. v. Haggard*, 37 Ill. 465; *Heyman v. Covell*, 36 Mich. 157; *East v. Cain*, 49 id. 473; *Carew v. Matthews*, 41 id. 576. But as has been already pointed out (*supra*, p. 141, n. 2), there is an exception to this rule in cases of outlawry, at-
tainer, alien enemy, etc., in which instances, the action being suspended on account of the disability of the plaintiff to sue, he cannot have a better writ. See *Boston Type Foundry v. Spooner*, 5 Vt. 93.

defense; (t) nor after a general imparlance; (u) nor after oyer (x) or a view; (y) nor after voucher; (z) nor after a plea in bar. (a) And besides these, there are other proceedings also which have the effect of excluding a subsequent dilatory plea, but being of a less ordinary and general kind, it is not necessary here to notice them more distinctly. *(b)*¹

RULE VIII.

§ 225. All affirmative pleadings which do not conclude to the country must conclude with a verification. *(c)* —

Where an issue is tendered to be tried by jury, it has been shown that the pleading concludes *to the country. (d)* In all other cases, pleadings, if in the affirmative form, must conclude with a formula of another kind, called a *verification* or an *averment*. The verification is of two kinds — *common* and *special*. The common verification is that which applies to ordinary cases, and is in the following form: “And this the said A. B. [or C. D.] is ready to verify.” *(e)* The special verifications are used only where the matter pleaded is intended to be tried by record or by some other method than a jury. They are in the following forms: “And this the said A. B. or C. D. is ready to verify by the said record;” or, “And this the said A. B. [or C. D.] is ready to verify when, where and in such manner as the court here shall order, direct or appoint.” *(f)*

The origin of this rule is as follows:

It was a doctrine of the ancient law, little if at all noticed by modern writers, that every pleading affirmative in its nature must be supported by an offer of some *mode of proof; (g)* and the reference to a jury, who, as formerly explained, were in the nature of witnesses to the fact in issue, *(h)* was considered as an offer of *proof*, within the meaning of that doc-

(t) Com. Dig., Abatement (I. 16).

(u) Ibid. (I. 20).

(x) Ibid. (I. 22).

(y) Ibid. (I. 25).

(z) Ibid. (I. 28).

(a) Ibid. (I. 23).

(b) See the instances Com. Dig., Abatement (I. 26), etc. See Appendix, note (33).

(c) Com. Dig., Pleader (E. 32), (E. 33); Co. Litt. 303 a; Finch, Law. 356.

(d) Vide supra, p. 287.

(e) See the various examples of pleading given in the course of this work.

(f) Vide supra, p. 289.

(g) See Appendix, note (34).

(h) Supra, p. 215.

¹ See 3 Black. Com. 298.

trine. (i) When the proof proposed was that by jury, the offer was made in the *viva voce* pleading by the words *prest d'averrer* or *prest, etc.*, (k) which in the record was translated, *Et hoc paratus est verificare*. On the other hand, where other modes of proof were intended, the record ran, *Et hoc paratus est verificare per recordum*, or *Et hoc paratus est verificare quocunque modo curia consideraverit*. But while these were the forms in general observed there was the following exception, that on the *attainment of an issue* to be tried by jury the record marked that result by a change of phrase, and substituted for the verification the conclusion *ad patriam*, to the country. The written pleadings (which, it will be remembered, are framed in the ancient style of the record) (l) still retain the same formulæ in these different cases, and with the same distinctions as to their use. They preserve the conclusion to the country to mark the attainment of an issue triable by jury, but in other cases conclude with a translation of the old Latin phrase, *Et hoc paratus, etc.*; and hence the rule that an affirmative pleading that does not conclude to the country must conclude with a verification. (m)

As the ancient rule requiring an offer of proof extended only to *affirmative* pleadings (those of a *negative* kind being in general incapable of proof), so the rule now in question applies to the former only, no verification being in general *necessary* in a negative pleading; (n) but it is nevertheless the practice to conclude with a verification all negative, as well as affirmative, pleadings that do not conclude to the country.

RULE IX.

§ 226. In all pleadings where a deed is alleged, under which the party claims or justifies, proof of such deed must be made. (o)¹ — § 80

Where any party pleads a deed, and claims or justifies under

(i) See Appendix, note (85).

(k) See Appendix, note (86).

(l) *Vide supra*, p. 106.

(m) "Every plea or bar, replication, etc., must be offered to be proved true by saying in the plea, *Et hoc paratus est verificare*, which we call an averment." Finch. Law, 359. This gives confirmation, it will be observed, to the account of the origin of this rule contained in the text.

(n) Co. Litt. 303 a; Millner v. Crowdall, 1 Show. 338.

(o) Com. Dig., Pleader (O. 1); Leyfield's Case, 10 Rep. 83.

¹ See *supra*, pp. 159-160, notes; Dugger v. Oglesby, 99 Ill. 405.

it, the mention of the instrument is accompanied with a formula to this effect: "One part of which said indenture" (or other deed), "sealed with the seal of the said —, the said — — now brings here into court, the date whereof is the day and year aforesaid." (*p*)

This formula is called *making profert* of the deed. Its present practical import is that the party has the instrument ready for the purpose of giving oyer; (*q*) and at the time when the pleading was *viva voce* it implied an *actual production* of the instrument in *open court* for the same purpose.

The rule, in general, applies to *deeds* only. No profert, therefore, is necessary of any written agreement or other instrument not under seal, (*r*) nor of any instrument which, though under seal, does not fall within the technical definition of a *deed* — as, for example, a sealed will or award. (*s*) This, however, is subject to exception in the case of letters testamentary and letters of administration; executors and administrators being bound, when plaintiffs, (*t*) to support their declaration by making profert of these instruments.

The rule applies only to cases where there is occasion to *mention the deed in pleading*. When the course of allegation is not such as to lead to any mention of the deed, a profert is not necessary, even though in fact it may be the foundation of the case or title pleaded.

The rule extends only to cases where the party *claims* under the deed or *justifies* under it; and therefore, when the deed is mentioned only as *inducement* or introduction to some other matter on which the claim or justification is founded, or *alleged only to controvert the title of the opposite party*, and not to establish title in the party pleading, no profert is necessary. (*u*)

The rule is confined, too, to cases where the party relies on the *direct and intrinsic operation of the deed*. (*x*) Thus, in

(*p*) See the example *supra*, p. 116.

(*q*) As to oyer, see p. 159.

(*r*) Com. Dig., Pleader (O. 3); *Aylesbury v. Harvey*, 3 Lev. 205.

(*s*) Com. Dig., Pleader (O. 3).

(*t*) But *semb.* that they are not bound to make profert where they have occasion to plead the letters testamentary, etc., as *defendants*. See *Marsh v. Newman*, Popham, 163, 164, cites 36 Hen. 6, 36.

(*u*) *Bellamy's Case*, 6 Rep. 38 a; *Holland v. Shelby*, Hob. 308; *Banfill v. Leigh*, 8 T. R. 571; Com. Dig., Pleader (O. 16).

(*x*) *Banfill v. Leigh*, 8 T. R. 571; *Read v. Drootman*, 3 T. R. 150.

pleading a conveyance under the statute of uses, it is not necessary to make profert of the lease and release, because it is the *statute* that gives effect to the conveyance, and the deeds do not intrinsically establish the title.

Another exception to the rule obtains where the deed is *lost or destroyed* through time or accident, or is *in the possession of the opposite party*. (y) These circumstances dispense with the necessity of a profert, and the formula is then as follows: "Which said writing obligatory" (or other deed) "having been lost by lapse of time" (or, "destroyed by accidental fire," or, "being in the possession of the said — — —"), "the said — — — cannot produce the same to the court here." (z)¹

The reason assigned for the rule requiring profert is that the court may be enabled, by inspection, to judge of the sufficiency of the deed. (a) The author, however, presumes to question whether the practice of making profert *originated* in any view of this kind. It will be recollected that by an ancient rule all affirmative pleadings were formerly required to be supported by an offer of some mode of proof. (b) As the pleader, therefore, of that time concluded in some cases by offering to prove by jury or by record, so in others he maintained his pleading by producing a *deed* as proof of the case alleged. In so doing he only complied with the rule that required an offer of proof. Afterwards, the trial by jury becoming more universally prevalent, it was often applied (as at the present day) to determine questions arising as to the genuineness or validity of the deed itself so produced; and from this time a deed seems to have been no longer considered as a method of proof, distinct and independent of that by jury. Consequently it became the course to introduce, as well in pleadings where the party relied on a deed as in other

(y) *Read v. Brookman*, 3 T. R. 156.

(z) 2 Chitty, 153.

(a) *Leyfield's Case*, 10 Rep. 92 b.

(b) *Vide supra*, p. 425.

¹ If the deed is one where profert is necessary, it must be made or it must be alleged that the deed is lost; if profert is made, proof cannot be received of loss. *Dugger v. Oglesby*, 99 Ill. 405; *Smith v. Woodward*, 4 East, 586; *Powers v. Ware*, 2 Pick. 451; *Wofford v. Board, etc.*, 44 Miss. 537. See *Profert*.

cases, the common *verification* or offer to prove by *jury*; and the true object of the profert was in this manner not only superseded, but forgotten, though in practice it still continued to be made. (c)

RULE X.

§ 227. All pleadings must be properly entitled of the court and term. (d)¹—

With respect to the title of the *court*, it consists, in general, of a superscription of the name of the court, thus: "In the king's bench," "in the common pleas," or "in the exchequer." (e) But in a declaration by bill, in the king's bench, it consists of a superscription of the name of the prothonotary. (f)

With respect to the title of the *term*, it is either *general*, thus: "Trinity term, in the fourth year of the reign of King George the Fourth," (g) or *special*, thus: "Monday next, after fifteen days of the Holy Trinity, in the fourth year of the reign of King George the Fourth."

Such title refers to the time when the party is supposed to deliver his oral allegation in open court, and as it was only in *term* time that the court anciently sat to hear the pleading, it is therefore always of a *term* that the pleadings are entitled, though they are often in fact filed or delivered in vacation time. The term of which any pleading is entitled is usually that in which it is actually filed or delivered; (h) or, where this takes place in vacation time, the title is of the term last preceding.

The most frequent practice is to entitle *generally* (according to the first form above given). But it is to be observed that a pleading so entitled is by construction of law presumed, unless proof be given to the contrary, to have been pleaded on the *first day* of the term. And the effect of this is, that if a *general* title be used, it will sometimes occasion an apparent

(c) See Appendix, note (87).

(d) 1 Chitty, 261, 527, 528; 1 Arch. 72, 162; Topping v. Frye, 1 Marsh. 341.

(e) 1 Chitty, 262, 527; Com. Dig., Pleader (C. 7). See the examples *supra*, pp. 109-115 etc.

(f) See the example *supra*, p. 132.

(g) See the examples *supra*, p. 109, etc.

(h) But *dilatory pleas*, though pleaded in a term subsequent to that of which the declaration is entitled (as is sometimes the case), must yet always be entitled of the same term with the declaration, unless pleaded with a special or general special imparlance. See this farther explained, 1 Chitty, 422, 447.

¹ So under the code, *supra*.

objection. Thus, in the case of a declaration so entitled, it may appear in evidence on the trial that the cause of action arose in the course, and after the first day of, term of which the declaration is entitled, or this may appear on the face of the declaration itself; and in either case this objection would arise, that the plaintiff would appear to have declared before his cause of action occurred; whereas the cause of action ought of course always to exist at the time the action is commenced. The means of avoiding this difficulty is to entitle *specially* (according to the second form above given) of the *particular day* in the term when the pleading was actually filed or delivered.

RULE XI.

§ 228. All pleadings ought to be true. (2)¹—

While this rule is recognized, it is at the same time to be observed that in general there is no means of *enforcing* it as a rule of pleading, because in general there is no way of proving the falsehood of an allegation till issue has been taken, and trial had, upon it.²

It may also be observed that, notwithstanding this rule, a practice has prevailed of what is called *sham pleading*, that is, pleading for the mere purpose of delay a matter which the pleader knows to be false.³ There are certain pleas of this kind, which, in consequence of their having been long and frequently used in practice, have obtained toleration from the courts; and though discouraged, are tacitly allowed; as, for example, the common plea of *judgment recovered*, viz., that judgment has been already recovered by the plaintiff for the same cause of action. But in other cases a sham plea, when ascertained to be so, is not allowed. It is true that, as already observed, it

(1) Bac. Ab., Pleas, etc. (G. 4); Sade v. Drake, Hob. 295; Smith v. Yeomans, 1 Saund. 316.

¹ Oakley v. Devoe, 12 Wend. 196.

² Tucker v. Ladd, 4 Cow. 47; Brewster et al. v. Holl, 6 Cow. 31; Moyer v. Brand, 102 Ind. 301. See Shaw's Pleading.

³ "A defense is sham," said the court in People v. McCumber, 18 N. Y. 315, 72 Am. Dec. 515, "which is so clearly false in fact that it does not in reality

involve any matter of substantial litigation. The defense may be entirely clear in form, but nevertheless sham, for the reason that it is false." Brewster & Bostwick v. Hall, 6 Cow. 34; Piercy v. Sabin, 10 Cal. 27, 70 Am. Dec. 692; Brown v. Porter, 7 Wash. 337.

cannot in general, and in the regular course, be proved that a plea is false till the trial; but where a plea is not in the usual and tolerated form of a sham plea, and the matter pleaded is at the same time very improbable, and presumably intended as a plea of that description, the court will, *on motion*, supported by affidavit of its falsehood, allow judgment to be signed by the plaintiff as for want of plea, and make the defendant or his attorney pay the costs. (*k*)¹ And the court has, in all cases, power to punish for sham pleading and has often strongly censured the practice.²

Lastly, there is an exception to the rule in question in the case of certain *fictions* established in pleading for the convenience of justice. Thus, the declaration in ejectment always states a fictitious demise, made by the real claimant to a fictitious plaintiff; and the declaration in trover uniformly alleges, though almost always contrary to the fact, that the defendant *found* the goods in respect of which the action is brought.

(*k*) *Thomas v. Vandermoelen*, 2 Barn. & Ald. 197; *Partley v. Godalake*, id. 199; *Shadwell v. Berthoud*, 5 id. 750, 1; *Richley v. Proove*, 1 Barn. & Cress. 286.

¹ See *Briggs v. Bergen*, 23 N. Y. 163; *Butchers' & D. Bank v. Jacobson*, 23 How. Pr. 473; *Fabbricotti v. Lounitz*, 3 Sandf. 743; *Torrence v. Strong*, 4 Oreg. 39. See the statutes and codes of the various states. At common law the general issue could not be struck out as sham, though shown by affidavits to be false. See *Broome Co. Bank v. Lewis*, 18 Wend. 565. By the codes the power of the court to strike out was not increased (see however, *Coykendall v. Robinson*, 39 N. J. L. 98), and the power will be exercised with extreme caution and only in clear cases. *Wayland v. Tysen*, 45 N. Y. 281. See, also, *Gostorfs v. Tanse*, 18 Cal. 888; *Fay v. Cobb*, 51 id. 813; *Patrick v. McManus*, 14 Colo. 65, 2 Am. St. Rep. 253. It is

held in some states, that, though an answer be verified, it may be stricken out. *Dobson v. Hallowell*, 53 Minn. 98; *Hayward v. Grant*, 13 id. 135, 97 Am. Dec. 228. *Contra*, *Central Nat. Bank v. Thein*, 58 N. Y. St. R. 239; *Schultze v. Rodewald*, 1 Abb. N. C. 365.

² The terms upon which the answer may be stricken out under the code are in the discretion of the court. *Frost v. Harford*, 40 Cal. 166. If the defendant commits perjury in verifying his answer he may be prosecuted therefor. *Wayland v. Tysen*, 45 N. Y. 281. This subject is discussed at length, and with the citation of many authorities, in a note to the case of *People v. McCumber*, 72 Am. Dec. 515.

CHAPTER XII.

CONCLUSION.

§ 229. **Concluding remarks on the merits of the system of pleading.**—To the view that has been taken in this work of the principles of the system of pleading it may be useful to subjoin a few remarks on the merits of that system, considered in reference to its effects in the administration of justice.

When compared with other styles of proceeding it has been shown to possess this characteristic peculiarity — that it *produces an issue*;¹ that is, it obliges the parties so to plead as to develop, by the effect of their own allegations, some particular question as the subject for decision in the cause. With respect to the *degree* of particularity with which such question or issue is developed, we have seen, in the first place, that it is always distinctly defined as consisting either of *fact* or *law*: because, in the former case, it arises on a traverse; in the latter, it presents itself in the very different shape of a demurrer. But, independently of this distinction, it will be remembered that the issue produced is required to be *certain*, or *specific*. It is true that some issues are framed with much less certainty than others. Thus the general issue, in *assumpsit* and other actions of trespass on the case, presents a question abundantly more general than that on the execution of a release by duress, which occurred, by way of example, in a former part of this work; and with respect to the whole class of general issues, it will be observed that they raise questions much less circumstantial than those which occur after special pleas. Still, however, it is the universal property of all issues to define the question for decision in a shape more or less specific. Even the general issue in *assumpsit*, which is one of the most indefinite in its nature, raises this question, viz.,

¹The contrast between the civil plained in Langdell's Sum. Eq. Pl. law and equity in this respect is ex- § 34.

whether the defendant be liable to the demand circumstantially stated in the declaration, and thus presents to the mind a distinct and practical, though general, idea of the matter to be tried.

That prior to the institution of any proceeding for the purpose of decision the question to be decided should be by some means publicly adjusted as consisting either of fact or law, and this, too, with some certainty or specification of circumstance, is evidently required by the nature of the English common-law system of jurisprudence. For, by the general principles of that system, questions of law are determinable exclusively by the judges, while questions of fact (some few instances excepted) can be decided only by a jury; and in those excepted cases are referred to other appropriate modes of trial. Unless, therefore, some public adjustment of the kind above described took place between the parties, they would be unable, after the pleading had terminated, to pursue farther their litigation. For they might disagree upon the very form of the proceeding by which the decision was to be obtained; or if they both took the same view of the general nature of the question, so that they both referred their controversy to the same method of determination—for example, trial by jury,—they might yet differ as to the shape of the question to be referred.

A public adjustment of the point for decision, of the specific kind above described, being for this reason necessary, there are two ways in which it might conceivably be affected: either by a retrospective selection from the pleading or by the mere operation of the pleading itself. The law of England, in producing an issue, pursues the latter method. For, as has been shown, the alternate allegations are so managed that, by the natural result of that contention, the undisputed and immaterial matter is constantly thrown off until the parties arrive at demurrer or traverse; upon which a tender of issue takes place on the one hand, and an acceptance of it on the other; and the question involved in the demurrer or traverse is thus mutually referred to decision.

The production of an issue, when thus defined and explained, appears to be attended with considerable advantage in the administration of justice; for the better comprehension of

which it will be useful to advert to those styles of juridical proceeding in which no issue is produced.

In almost every plan of judicature with which we are acquainted except that of the common law of England, the course of proceeding is to make no public adjustment whatever of the precise question for decision. For, as all matters, whether of law or fact, are decided by the judge, and by him alone, upon proofs adduced on either side by the parties, the necessity upon which that practice has been shown to be founded in the English common-law system does not arise. Consequently, the mutual allegations are allowed to be made *at large*, as it may be called — that is, with no view to the exposition of the particular question in the cause by the effect of the pleading itself. The litigants, indeed, before they proceed to proof, must explore the particular subject in controversy, in order to ascertain whether any proof be required, and to guide them to the points to which their proof is to be directed. And upon the hearing of the cause the judge must of course also ascertain, for his own information, the precise point to be decided, and consider in what manner it is met by the evidence. But in these proceedings, neither the court nor the parties have any public exposition of the point in controversy to guide them; and they judge of it, as a matter of private discretion, upon retrospective examination of the pleadings. (d)

This, as already stated, is the almost universal method; but there is another which also requires notice, viz.: that which at present prevails in the Scottish judicature. Since the trial by jury in civil causes has been engrafted upon the juridical system of Scotland, it has of course been found necessary to adjust and settle publicly between the parties the particular question or questions on which the decision of the jury is to be taken. But instead of eliciting such question (called, by analogy to the law of England, the issue) by the mere effect and operation of the pleading itself, according to the

(d) The practice of the courts of *equity* in this country forms no exception to this general statement. For, though the common replication offers a formal contradiction to the answer,—a contradiction which smitates, in some measure, the form of an issue in the common law, and borrows its name,—yet, in substantive effect, the two results are quite different; for the contradiction to which the name of an issue is thus given in the equity pleading is of the most general and indefinite kind, and develops no particular question as the subject for decision in the cause.

practice of the English courts, the course taken has been to adjust or settle the issue *retrospectively* from the allegations, by an act of court; and these allegations have consequently continued to be made *at large*, according to the definition of that term already given. (e)

Now the English common-law method, as compared with either of those that have been just described, possesses this advantage: that the undisputed or immaterial matter which every controversy more or less involves is cleared away by the effect of the pleading itself; and therefore, when the allegations are finished, the essential matter for decision necessarily appears. But under the rival plans of proceeding by which the statements are allowed to be made at large, it becomes necessary, when the pleading is over, to analyze the whole mass of allegation, and to effect for the first time the separation of the undisputed and immaterial matter in order to arrive at the essential question. This operation will be attended with more or less difficulty, according to the degree of vagueness or prolixity in which the pleaders have been allowed to indulge; but where the allegations have not been conducted upon the principle of coming to issue, or, in other words, have been made at large, it follows from that very quality that their closeness and precision can never have been such as to preclude the exercise of any discretion in extracting from them the true question in controversy, for this would amount to the production of an issue. Therefore it will always be in some measure doubtful, or a point for consideration, to what extent and in what exact sense the allegations on one side are disputed on the other, and also to what extent the law relied upon by one of the parties is controverted by his adversary. And this difficulty, while thus inherent in the mode of proceeding, will be often aggravated and present itself in a more serious form from the *natural tendency* of judicial statements, when made at large, to the faults of vagueness and prolixity. For where the pleaders state their cases

(e) It is to be understood, however, that the issues are not extracted from the pleadings in the full latitude of allegation sometimes allowed to them by the Scottish law, but from allegations of a more succinct and specific character, called *condescendences* and *answers*; which the parties are directed to give in, as the materials from which the court are to adjust the issue. Yet, even these *condescendences* and *answers* are pleadings *at large*, in the sense in which the author uses that term; for they do not develop the point in controversy by their intrinsic operation.

in order to present the materials from which the mind of the judge is afterwards to inform itself of the point in controversy, they will of course be led to indulge in such amplification on either side as may put the case of the particular party in the fullest and most advantageous light, and to propound the facts in such form as may be thought most impressive or convenient, though at the expense of clearness or precision. On the other hand, it is evident that upon the English common-law method the pleaders, having no object but to produce the issue, are without the least inducement either to an uncertain or a too copious manner of statement, and on the contrary have a mutual interest to effect the result at which they aim in the shortest and most direct manner.

The difficulty that must thus be always, in some measure, found under the method of pleading at large, in ascertaining the precise extent of the mutual admissions of fact or law, is attended with this obvious inconvenience: that a party may be led to proceed to proof or trial upon matters not disputed or not considered as material to be disputed on the other side, or to omit the proof or trial of matters which are meant to be disputed and which are in fact essential to the final determination of the cause. The judge may consequently find, upon examination of the whole process, and hearing the farther allegations and arguments of the parties, that the investigation of fact has either been redundant, and therefore attended with useless expense and delay, or defective, so as not to present him with the materials on which he can properly adjudicate. On the other hand, these evils are unknown to the English system of judicature except in a very partial degree; and to that degree they arise, as will be afterwards explained, in consequence of the latitude of some of the general issues; in other words, from a partial abandonment of its own peculiar principle.

On the whole, then, it may be fairly concluded that the system of pleading is not only distinguished from other methods of judicial allegation by its production of an issue, but is in this respect *advantageously* distinguished from them, and derives, from this singularity of proceeding, considerable protection from inconveniences to which they are severely subject.

It also appears to deserve high praise, in respect of such of its rules as are classed in this work, by their tendency to pre-

vent *obscurity*, or *confusion*, *prolixity*, or *delay*. Here, indeed, the objects pursued are not peculiar to the English system; for the avoidance of such faults is of course, in some measure, the aim of every enlightened plan of judicature. But, in general, there is either a want of regulation to enforce the object, or the regulation is found to be ineffectual. On the contrary, the system of pleading has various rules specifically designed to promote precision and brevity in the method of allegation, rules exclusively its own, and extremely strict and efficacious in their character. Accordingly, it has ever been proverbially famous for the former of these qualities; and in modern times, and under the influence of enlightened judges, the principle of avoiding the introduction of unnecessary matter has been so rigorously applied, and the cases of unnecessary allegation have been so well defined and understood (*h*) as very considerably to remove its not less ancient and notorious *reproach* of amplification and prolixity.¹

While the system of pleading is thus, in general, distinguished for the excellence of its structure, it cannot be denied that there are points on which its merit is questionable.

1. There is something not satisfactory in its tendency to decide the cause upon points of mere form.

It will be observed that, in general, whenever a demurrer occurs in respect of insufficiency in the manner of statement, and not for insufficiency in substance, or where an issue, either in fact or law, is joined upon a plea in abatement, the issue joined in such cases involves a question of form only. And as the issue, whatever be its nature, is in general decisive of the fate of the cause, (*i*) it follows that where issue is so joined, the action must commonly be decided upon a point of form and not upon the merits of the case — a result that seems inconsistent with sound justice. Thus, if the plaintiff in an action of trespass should happen to omit in his declaration to state the day or time at which the trespass was committed, and the defendant should demur specially for this omission, and the issue joined on this demurrer should be decided (as it

(*h*) This is by the effect of the rules tending to limit or restrain the degree of certainty in allegation. *Vide supra*, pp. 360, 360.

(*i*) *Vide supra*, p. 191.

¹ See remarks of Justice Grier, *McFall v. Ramsay*, 20 How. 427.

would be) in favor of the defendant, by the regular consequence judgment would be also given for the defendant, and the plaintiff's claim would be defeated by the omission of a few words in his declaration. Yet we have seen that the time if alleged need not have been proved as laid, and its omission, therefore, is a fault of the most strictly formal kind. Again, if the defendant should plead in abatement that he is sued by a wrong Christian name, and the plaintiff should choose to take issue in fact upon the plea and go to trial, the verdict, if given for the plaintiff, entitles him to judgment *quod recuperet*, and he consequently recovers his demand. (1) On the other hand, if given for the defendant, it is followed by judgment of *breve* (or *billa*) *cassetur*, and thus the action in one case, and in the other both the action and the demand itself, are disposed of upon a mere question relating to the Christian name of the defendant.

But if any objection attach on this ground to the system of pleading, its weight, at least, is much diminished by the liberality with which *amendments* are allowed in the modern practice. Thus, in the case of demurrer above supposed, if the plaintiff should imprudently join in demurrer (instead of applying, as he ought, for leave to amend), the court would nevertheless after joinder in demurrer, and even after the demurrer had come on to be argued, allow him to amend, and the only inconvenience that he would suffer would be the payment of costs. The second case, indeed, viz.: that in which an issue in fact is joined upon a plea in abatement, is such as would not allow of amendment unless applied for before the cause had come on for trial. But even in this instance it is not probable that any hardship or injustice would arise by the final determination of the cause upon the point of form, for if the unsuccessful party had had any substantial case upon the merits he would presumably have applied to amend without hazarding the trial.

2. Again some doubt may reasonably be felt with respect to the advantage of that part of the system which relates to the *singleness* of the issue. Provided only that a party be restrained

(1) *Vide supra*, p. 192; 2 Wills. 367. The case is otherwise, however, if the plaintiff succeeds on an issue in law on a plea in abatement, for there the judgment is *respondent ouster* only. *Ibid.*

from raising issues inconsistent with each other, or such as he knows to be without foundation in fact, it may be questioned whether any sufficient considerations of utility or convenience can be urged at the present day in favor of the object of *singleness*.¹ At all events some presumption must arise against the value of this object in modern pleading when we recollect that the long-permitted use of several counts in respect of the same cause of action, and the provision of the statute of Anne allowing the use of several pleas, have declared it as the sense both of the bench and the legislature that, if the original principle deserved to be retained, it required at least material mitigation. However, it is clear that the principle of singleness is so far, at least, a right and valuable one, as it may tend to prevent the parties from offering *inconsistent* allegations, or *such as they may know to be false*. For, though the interests of justice seem to require in many cases the allowance of several counts or pleas in respect of the same demand, they are, on the other hand, directly opposed to the allowance of repugnant ones; and where one of the matters alleged must evidently be false, the party should of course be obliged to make his election between them; and so in allowing a party to make different allegations, he ought, if possible, to be excluded from such as (whether inconsistent or not with what has been previously pleaded) he must know to be without foundation in fact. Yet these, which are perhaps the only beneficial results that can flow from the principle of singleness, the present state of the law against duplicity unfortunately fails to produce. For, first, a plaintiff is at liberty to adopt as many counts as he pleases, however apparent it may be that the cases which they respectively state cannot all be true. So a defendant is allowed, under the provision of the statute of Anne, to plead, with scarcely any exception, matters directly inconsistent with each other; for example, he may plead, in trespass for assault and battery, not guilty (namely, that he did not commit the trespasses), and also *son assault demesne*, viz.: that he committed them in self-defense, (n) or, in debt on bond, *non est factum* (viz.: that he

(n) 1 Arch. 236.

¹ This defect is obviated by allowance of several pleas. See remarks ing several causes to be joined or of court in *Manders v. Craft*, 3 Colo. stated in several counts, and the al- App. 236.

did not execute the deed), and also that he executed it under duress of imprisonment. (o) Again, a party is not restrained by the present system from adding to his true case another that, though consistent with it, he knows to be false. And accordingly a defendant at the same time that he pleads a special plea founded on his real matter of defense almost always resorts also to the general issue or some other plea by way of traverse, in order to put the plaintiff to the proof of his declaration, without having, in truth, the least reason to deny the allegations which it contains. The statute of Anne, indeed, provides a check against this by a provision of which the general effect is as follows: that where the defendant has pleaded several pleas and the issue upon any one of them is found for the plaintiff, the court may give the plaintiff the costs of every such issue, unless the judge of *nisi prius* shall certify that the defendant had probable cause to plead the matter found against him. But the construction and effect given to this provision in practice seem to have rendered it inadequate to the object which it contemplates. (p)

3. Another feature of doubtful character in the system of pleading is the wide effect which belongs, in certain actions, to the general issue. In debt on simple contract — in *assumpsit*, and trespass on the case, in general — the general issue embraces almost every ground of defense to which the defendant at the trial may choose to resort; the questions offered by these issues being in effect nearly these: whether the defendant be indebted to the plaintiff, as alleged in the declaration, or whether he be liable to the plaintiff's demand, as set forth in the declaration. Now, these questions are so general and vague as to produce, but in a limited and inferior degree, the advantages which attend the production of a more strict and special issue. For, first, they do not fully effect the separation of matter of fact from matter of law. To understand this it must be considered that though the parties cannot go to trial on a *mere* question of law (a traverse of matter of law not being allowable), yet it is, in the nature of many issues in fact, to involve some subordinate legal question, the decision of which is essential to the decision of the

(o) *Ibid.* And see other instances open in some measure to the same objection of inconsistency, *supra*, p. 333.

(p) See 11 *East*, 263; 3 *Burr.* 753.

issue. And the wider and more general the form of the issue the more likely it is to comprise these subordinate questions of law. For example, in an action of debt on simple contract, or *assumpsit*, if the defendant rely on a release executed by the plaintiff, he may give this in evidence under the general issue (*nil debet*, or *non assumpsit*), because it tends to show that he is not indebted, or is not liable as alleged, and if the plaintiff's answer to the release be that it was obtained by duress, this will of course be also offered in evidence under the same issue. Upon this point of duress two questions may be supposed to arise: first, whether the execution of the deed under duress would defeat the effect of the deed; secondly, whether the deed were in fact executed under duress. Before the jury can find a verdict either for the plaintiff or defendant, both these questions must be disposed of. But the first is a question of mere law, and their decision upon it must be guided by the direction of the judge. Here, then, is a question of law involved under the issue in fact. Now if, on the other hand, a form of action be supposed in which the pleading is more special, and the general issue less comprehensive—for example, the action of covenant,—this very same question will be distinctly developed as a point of law upon the pleading, by way of demurrer. For the defendant cannot, under *non est factum* (which is the general issue in that action), set up the release, but must plead it specially, and the plaintiff must consequently plead the duress in reply; and then, if the defendant disputes the legal consequence of the duress, his course is to demur to the replication. Of such demurrer, occurring in the very case here imagined, the reader has already seen an example in the course of this work, and to this he may be again referred for farther illustration.

It thus appears, then, that it is the effect of the wider general issues to render less complete than it otherwise would be, the separation of fact from law. And the inconvenience of this is felt in the great frequency with which difficult legal questions arise for the opinion of the judge at *nisi prius*, the numerous motions for new trials consequently made in the court in bank to obtain a revision of such opinions, and the delay and expense necessarily attendant on a proceeding of this kind when compared with the regular method of demurrer.

Again, it is an inconvenience arising from general issues of

this description that they tend to conceal from each party the case meant to be made by his adversary at the trial. Thus, in the instance above supposed, the plaintiff would have no notice from the nature of the issue, *nil debet* or *non assumpsit*, that the defendant meant to set up a release; nor would the defendant, on the other hand, have any intimation that it was to be met by the allegation of duress. And thus is defeated, in some measure, another of the advantages otherwise attendant on the production of an issue, viz.: that of apprising the parties of the precise nature of the question to be tried, and enabling them to shape their proofs without danger of redundancy on the one hand or deficiency on the other.¹

4. Another objection to the system of pleading, and one more formidable, perhaps, than any that has been above suggested, is to be found in the excessive subtlety and needless precision by which some parts of it are characterized. The existence of these faults cannot fairly be denied, nor that they bring upon suitors the frequent necessity of expensive amendments, and sometimes occasion an absolute failure of justice upon points of mere form. Yet is their inconvenience less severely felt in practice at the present day than a mere theoretical acquaintance with the subject would lead the student to suppose. Many of the intricacies and mysteries of pleading—those, for example, which relate to *color* and *special traverses*, long discouraged by the courts—are rapidly falling into disuse, and on the whole have but little effect in the actual operation of the system; and with respect to the science in general, it may be remarked that its increasing cultivation has made the course of practice more uniformly correct than in former times and the occasions for formal objections considerably less frequent.

Such are the principal observations which a long practical acquaintance with pleading has suggested to the author on the merits of that celebrated system of allegation. Founded as they are on experience, he does not hesitate to offer them to the public, though the limits which he has prescribed to himself in this part of the work have obliged him to condense them into a form more summary than befits the interest, the importance, and the difficulty of the subject.

¹ The bill of particulars in a large measure obviates this defect.

PART IV.

APPENDIX OF AUTHOR'S NOTES AND NEW MATTER
ILLUSTRATING THE TEXT.

APPENDIX.

[EDITOR'S NOTE. See pp. 38-43.]

Joinder of parties.—The opinion of Lord Justice Bowen in the late case of *Hannay v. Smurthwait*, 69 L. T. Rep. 677, is valuable as showing the history of the law in England on the joinder of parties, and is here set out in full.

Order XVI, which is headed "Parties," provides by rule 1:

"All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment."

The counsel for the plaintiffs argued that they were entitled under this rule to join in one action, as their claims all arose out of the same transaction, and the evidence, if they were tried separately, would be the same. If there should be any inconvenience, they said, in trying any one claim with the others, a separate trial for that case might be ordered under Order XVIII. They cited, as cases where persons having different causes of action were allowed to join, the following: *Booth v. Briscoe*, 2 Q. B. Div. 496; *Ayscough v. Bullard*, 60 L. T. Rep. (N. S.) 471; *Arnison v. Smith*, 60 L. T. Rep. (N. S.) 206; *Burstall v. Beyfus*, 50 L. T. Rep. (N. S.) 542, 26 Ch. Div. 85.

BOWEN, L. J.—"This case depends on the true construction of Order XVI, rule 1. The question is a difficult one, and I cannot say that I entirely agree with the master of the rolls. The divergence is not great, but I must say that I differ slightly on the construction of the rules. It seems to me that this order was not intended to allow a writ to be issued with any number of plaintiffs and defendants. A writ of summons is not like an omnibus into which anyone may get as it goes along. The question is, how far the joinder of plaintiffs is permitted by the rule, and what limitation, if any, exists, and is to be read into the rule, and if so, what is the true construction of such limitation? The rule cannot, I think, be really understood without considering its history as well as its language. *Before the Judicature Act the law on this point was pretty clear.* [The italics are mine.—See remarks of Judge Pitt Taylor in preface to *Taylor on Evidence*.—ED.] In the case of a contract all persons with whom the contract was made should join as plaintiffs, and no person could join simply because he was injured by a breach of a contract of another person. As to torts the law may be summed up as follows: All persons having a joint interest might sue jointly; persons having a separate interest and separate damage had to

sue separately; persons having a separate interest and joint damage might sue either separately or jointly. An instance may be found in the case of the dippers at Tunbridge Wells (*Weller v. Baker*, 2 Wils. 414), which is referred to in the note to *Coryton v. Lithebye* in 2 Wms. S. 116 [see p. 41], where the learning on this subject before the Judicature Act is collected. Another case which throws light on this point is *Forster v. Lawson* (*ubi supra*) [8 Bing. 452]. In the case of a libel upon partners, if the damage was separate they could not join the plaintiffs in one action, but they could do so if the damage was caused to them in the way of their trade. That, I understand, was the state of the law before the Judicature Act; but I think I ought also briefly to mention the rules as to joinder of plaintiffs under the Common-law Procedure Acts of 1852 and 1860. By section 84 of the act of 1852, non-joinder and misjoinder of plaintiffs might be amended before trial. As regards joinder of causes of action, as distinct from joinder of parties, section 41 provided that 'causes of action of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit; but this shall not extend to replevin or ejectment.' There these two things were kept quite distinct, namely: the constitution of the suit, which depended on the joinder of parties, and the law as to joinder of causes of action, assuming that by right joinder of parties the suit was properly constituted. Then came the Common-law Procedure Act of 1860. The words of section 19 are very important: 'The joinder of too many plaintiffs shall not be fatal, but every action may be brought in the name of all the persons in whom the legal right may be supposed to exist.' It still remained the theory of the law that a legal right was necessary for the action, and that it must be supposed to exist in the names of certain persons. The section then goes on: 'And judgment may be given in favor of the plaintiffs by whom the action is brought, or of one or more of them, or, in case of any question of misjoinder being raised, then in favor of such one or more of them as shall be adjudged by the court to be entitled to recover.' The effect of this was that a plaintiff could not be defeated by his having brought the action in the name of too many plaintiffs; but this was subject to a qualification, of which *Bellingham v. Clark* (1 B. & S. 332) and *Stubs v. Stubs* (1 H. & C. 257) are leading instances, namely, that the misjoinder would be fatal if inconsistent with the cause of action; that is to say, neither in contract nor in tort could a plaintiff be joined who had not the required interest or damage such as I have already referred to. That state of things still left possibilities of injustice and miscarriage; a plaintiff might still be defeated by a difficulty in showing in which plaintiff out of several the cause of action existed. Then came Order XVI. Rule 1 keeps the same subdivision as there was under the Common-law Procedure Acts, and it begins with the constitution of the action as to joinder of parties. Then Order XVIII deals with the joinder of causes of action. The framers of Order XVI, rule 1, did not mean that any number of plaintiffs might join against one defendant any number of causes of action whether separate or connected. If that had been meant, the rule would have been framed in a very different way; it might, for instance, have said that all persons may be joined as plaintiffs who choose to join. But the rule has been drawn in a very different way, and

seems to me to have been drawn on the same lines as previous legislation. It still keeps in sight the distinction between an action and a cause of action. The way in which rule 1 has been drawn shows what was intended by it. It says that all persons may be joined as plaintiffs in whom 'the' right to any relief claimed is alleged to exist. There are two things in the rule which differentiate it from any such general rule as I have suggested might have been made. One is the use of the word 'the,' which shows that the rule is drawn on the lines of section 19 of the Common-law Procedure Act of 1860, and the other is the addition of the words 'whether jointly, severally, or in the alternative.' Those last words would be unnecessary if the intention was that the rule should enable any number of plaintiffs to sue any number of defendants on any number of causes of action. Those two things in rule 1 denote that it is concerned solely with the identity of the relief claimed by the various plaintiffs. I do not know that the view I have expressed differs much from what the master of the rolls has said as to reading into the rule a necessity for identity of transaction. If by that is meant this, that the transaction must be the same, the question being merely who possesses the cause of action and to whom did the damage accrue, I do not know that there would be much difference between the view of the master of the rolls and mine. But if 'transaction' is used in its popular sense, meaning that if the plaintiffs rely on the same evidence there is only one transaction, then there is a difference between us. I think there must be identity in everything except as to the question which plaintiff has the right to sue. That being my view of Order XVI, rule 1, is it affected by Order XVIII? Order XVIII only refers to the joinder of causes of action; it does not enlarge earlier legislation as to the proper constitution of an action in respect to parties. I therefore do not think it enlarges the effect of Order XVI. But I will now consider the cases on the subject. The first is *Booth v. Briscoe* (*ubi supra*). Up to that time the law as regards libel stood thus: If there was no joint interest or damage, a number of persons could not be joined as plaintiffs, but partners could sue jointly for a libel on them in the way of their trade because the damage would be joint. In *Booth v. Briscoe* (*ubi supra*) there was one libel upon a number of trustees in regard to the management of their trust. The libel reflected on them personally, but not in the way of their trade or business. The case was just outside the law as it stood before the Judicature Act. The publication of the document was one transaction,— the question was as to using it as a cause of action. Bramwell, L. J., and the present master of the rolls thought that the case fell within Order XVI, rule 1, the plaintiffs claiming to be entitled to relief in respect of this document either jointly, severally, or in the alternative. The fact that each trustee had a separate cause of action in respect of one document was held not to take the matter out of the rule. In *Gort v. Rowney* (*ubi supra*) [17 Q. B. D. 625], there was no decision on this point, but the same minor divergence arose as in the present case, and the master of the rolls and myself traveled to the same conclusion on somewhat different lines. Then there is the important judgment of Lord Selborne in *Burstall v. Beyfus* (*ubi supra*). There the cause of action against one defendant was wholly disconnected from the cause of action against the other defendants except so far as it arose out of an incident in the same transaction, and

it was held that there was a misjoinder, the case not being one contemplated by Order XVIII. Lord Selborne emphasizes the distinction which I have endeavored to state between the objects of Order XVI, rule 1, and Order XVIII, rule 1. He said this: 'To bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (and only historically connected in the way I have suggested), is not contemplated by Order XVIII, rule 1, which authorizes the joinder, not of several actions against distinct persons, but of several causes of action.' Then there is also the case of *Sandes v. Wildsmith* (*ubi supra*) [1 Q. B. 771], in which the Divisional Court took the same view. Under these circumstances the question arises, taking the view which I adopt of the meaning of 'one transaction,' whether there is in this case one transaction upon which the plaintiffs are entitled to sue together. In my view there is not 'one transaction,' although there are several things in common to all the plaintiffs. All the goods carried were bales of cotton; they all came together in one ship. But the goods of the various plaintiffs came under different contracts of carriage, and the case of each plaintiff depends on how far as against him the ship-owners can show that the quantities in his bill of lading are wrong as to the shipments at the port of loading. It seems to me that the success of each plaintiff depends on that; and to my mind it would be productive of confusion rather than otherwise if the plaintiffs joined, and put all their contracts into one writ. I am afraid that doing this would lead to laxity on the part of the jury. Therefore I must say I am not pressed by any of the suggestions of mischief that might possibly occur in this case. The view which I hold of the effect of these rules I entertain strongly, and I have therefore thought it right to express it clearly."]

NOTE (1). See p. 2.

Pleé, in French,—in English, *plea*,—were anciently used to signify *suit* or *action*. While used in this sense they gave rise respectively to the words *pléder* and *to plead*; of which the first and primary meaning was, accordingly, to *litigate*; but which, in the later English law, have been taken in the more limited sense of *making allegation in a cause*. Hence the name of that science of *pleading* to which this work relates.

This variable word, to *plead*, has indeed still another and more popular use, importing the forensic *argument* in a cause; but it is not so employed by the profession.

Whether *pleé* and *pléder* were derived from the parallel Latin terms *placitum* and *placiture* is somewhat doubtful. (a) If so, it must have been through the gradation of the more

(a) Spelman considers the word *plea* as of Saxon origin. (See Spelm. Gloss.) But the almost universal derivation of our juridical terms from the language of the Normans would seem to render this exception an improbable one.

ancient French word *plaids*, which, according to Houard, (b) at first signified the assemblies of the kings and great men of the realm, and was afterwards applied to ordinary courts of justice. With respect to *placitum* itself it is most probably of Roman origin, for it is clear that both the rescripts of the emperors and the judicial decisions in the Roman empire had that name. (c) It has, however, been considered by some writers as derived from *plats* (a German word for *campus*), *quod in campo tenerentur placita*. (d) Either of these, though a less amusing, is perhaps a more satisfactory, conjecture than that which derives *placitum* from *placendo*,—*quia bene placitare super omnia placet*. (e)

NOTE (2). See p. 64.

This part of our juridical system, viz., the use of *brevia* or *writs* as essential formula for the institution of a suit, is not only connected with the whole scheme of actions, but will presently appear to have an important relation to pleading in particular. It is also remarkable as being (in modern times at least) unknown to the practice of the courts of other countries and a peculiarity of the national law. These circumstances naturally excite some curiosity to investigate its origin; yet the subject is involved in considerable obscurity. Though we know that some of the *brevia* are at least as ancient as the time of Henry II. (being to be found in the work of Glanville, who wrote in that king's reign), the student will in vain search the books of the science for any distinct and satisfactory account of their original invention. It is said, on high authority, that the more common and ordinary writs were "*de communi consilio totiùs regni concessa et approbata*;" (f) and also that some writs existed "long before the Conquest;" (g) while another learned writer asserts that the more ancient of them were brought from Normandy; (h) and these vague and some-

(b) *Anciennes Loix des François*, etc., sec. 10.

(c) See Brissot, *de verborum signif.*

(d) Ducange, *Gloss.*, verbo *Placitum*.

(e) *Co. Litt.* 17 a.

(f) *Bract.* 413 b.

(g) *Co. Pref.* to 10 Rep. This proposition of Lord Coke's seems to have been satisfactorily refuted by Hickes. See the *Dissertatio Epistolaris* in his *Thesaurus*.

(h) *Gillb. Hist. of C. P.* 2, 2.

what inconsistent statements seem to constitute the whole substance of the information to be derived from professional sources on this subject. If we turn for farther elucidation to the antiquarians, we shall find little beyond vague conjecture; and even in this a great discordance, both as to the origin of the instrument and the derivation of its name. While one learned writer refers the origin of the term *breve* to a new application among the Normans of a word derived from their Scandinavian ancestors, signifying a letter or epistle, (i) others speak of it as borrowed from the imperial and pontifical constitutions, and as ultimately derived from the word *brevis*. (k) Again, the language of these instruments is supposed, on great authority, (l) to have owed much to the Roman forms; though, on the other hand, an illustrious antiquarian declares that it has the most remote English extraction, and has hardly a word derived from the Cæsarean law. (m)

Whatever may be the authority for the opinion that *brevia* for the institution of suits were in existence in this country before the Conquest, it is at least certain that there is no mention of them in the laws of the Anglo-Saxons now extant; (n) but that they were in use both in substance and in name in the ancient laws of Normandy is a fact well known to all who have looked into the *Grand Coustumier*. On this, however, as on many other features common to the laws of England and Normandy, the doubt has been to which of the two nations the original invention is to be ascribed; for it seems to be clear that if the English at first received the institutions of their conquerors, they in turn began to impart their own improvements; and the *Grand Coustumier* is confessedly of date long posterior to the treatise of Glanville. (o) The remark of a learned foreigner not only tends to decide this question, but at the same time throws more light on the ulterior origin of the *brevia* than can be obtained from any writer of our own country. It is well known that the use of forensic formulæ obtained among the semi-barbarous tribes who gov-

(i) Hickes, *Theas. Diss. Epist.* in notis, p. 3.

(k) Spelm. *Gloss.*, tit. *Breve*; *Cragii Jus Feud.*, lib. II, D. 17, 23, 25. Selden's notes on *Hengham*.

(l) Barrington on the *Ancient Statutes*, 88, 90.

(m) Seld. *Diss. ad Fletam*, ch. 9, sec. 1.

(n) Hickes, *Theas. Diss. Epist.*, p. 3.

(o) See Hale's *Hist. of Com. Law* ch. vi.

erned Europe during the middle ages, at least among the French and Lombards — nations both distinguished among their neighbors by the superior refinement of their jurisprudence. (*p*) The author in question, who speaks of the *Brevia* of Glanville as *Brefs Anglo-Normands*, from their equal adoption in both countries, points out their similarity to certain forms preserved by Marculphus, and which, under the different names of *præceptiones* and *indiculi*, were used among the Franks during the two first races of the monarchy. (*q*) The resemblance in their general conception will be found strong enough to lead with great probability to the inference that the English *brevia* were derived through Normandy from a Francic source, an inference confirmed by the fact elsewhere stated by the same author, that at this early period the judicial usages of Normandy were in the main the same with those of France at large. (*r*) The reader may judge of the degree of similarity between the *Brevia* of Glanville and the *præceptiones* of the Franks by comparing the following formulary from Marculphus with the first of the English specimens given in the text, viz., the *writ of right*, p. 66: "Ille Rex, vir inluster, illo comiti. Fidelis Deo propitio, noster ille, ad præsentia mnostram veniens, clementiæ regni nostri suggessit eo quod pagensis vester ille, eidem, terram suam in loco nuncupante illo, per fortiam tulisset, et post se retineat injuste, et nullam justitiam ex hoc, apud ipsum, consequi possit; Propterea ordinationem presentem ad vos direximus, per quam omnino jubemus, ut ipso illo taliter constringatis, qualiter, si ita agitur, hanc causam contra jam dicto illo, legibus studeat emendare. Certé si noluerit, et ante vos recte non finitur, memorato illo, tultis fidejussoribus, Kalendas illas, ad nostram eum omnimodis dirigere faciatis præsentiam." (*s*)

If the reader will take the trouble to inspect the Anglo-Norman formula in the original Latin, as given by Glanville, he will find that it has the decided advantage over the French model in point of latinity and precision of phrase; the latter being indeed in such a barbarous dialect as to be scarcely intelligible.

(*p*) J. G. Heinecc., *Elm. Germ.*, lib. iii, tit. ii, secs. LXXXII, LXXXIII.

(*q*) Houard, *Anc. Loix des Francs*, etc., vol. ii, pp. 9-16.

(*r*) Houard, *Dict. Analytique*, etc., verbo *Droit*.

(*s*) Marculphi *Formularum*, lib. i, 33.

The following will be found to have a close affinity with the Anglo-Norman writ of *trespass for an assault*, which see *supra*, p. 81:

"Ille Rex, vir inluster, illi. Fidelis noster ille ad præsentiam nostram veniens, nobis suggessit quod vos eum, nulla manente causa, in via *adcalissetis*, et graviter livorassetis, et rauba sua in solidos tantos, eidem tulissetis, vel post vos retineatis indebitè, et nullam justitiam ex hoc, apud vos, consequere possit. Propterea, præsentem indiculum ad vos direximus, per quem omnino jubemus ut si taliter agitur, de præsentem hoc contra jam dicto illo, legibus studeatis emendare. Certè si nolueritis, et aliquid contra hoc habueritis quod opponere, non aliter fiat nisi vosmet ipsi per hunc indiculum commoniti, Kalendas illas proximas, ad nostram veniatis præsentiam, eidem ob hoc, integrum et legale dare responsum." (t)

The opinion that the English Brevia are of French extraction is not peculiar to Houard. It is held, as has been already observed, by Lord Chief Baron Gilbert; and a writer on the feudal law — the learned Craig — observes of them: *Usum in Gallia, antiquissimum puto; in Normannia, adhuc in usu sunt. Gulielmus Conquæstor cum armis, etiam leges Normannicas, Angliæ intulit; inde factum, ut omnes fere causæ in Anglia, adhuc per Brevia deducantur.* (u)

To attempt to trace them farther may appear superfluous; yet it may be observed that one of the earliest refinements in forensic science was that of classifying the various subjects of litigation and allotting to each class an appropriate *formula* of complaint or claim; a method devised in a view, probably, to the more certain definition of the nature of these injuries for which the law afforded redress, and perhaps, also, to save the trouble of inventing new modes of expression for each particular case of wrong as it might arise. Whatever the object, it is certain that such was the practice of ancient Rome, and *that* from a period almost as early as the introduction of the laws of the twelve tables; (x) and so severely were these formulæ observed, that any deviation from them was fatal to the cause. (y) This strictness evidently tended to injustice; and

(t) Marc. Form., lib. I, 22.

(u) Craig. Jus. Feud., lib. II, D. 17, 23, 25.

(x) Dig., lib. I, tit. 8; Cic. pro. Rosc. Com., ch. 8, etc.

(y) Quinotill., lib. VII, ch. 8; Brissou de Formul., lib. V, XL.

we accordingly find that it was banished from the Roman law by Constantine, who abolished the judicial formulæ. (2) Yet form was not altogether extirpated. Certain general distributions of the subjects of litigation were recognized under the title of *actions*, (a) and considerable attention continued to be paid to the frame and wording of the complaint. (b) When, therefore, we find the rude judicature of the nations who were in possession of Europe at the fall of the Roman Empire exhibiting at a very remote period the same contrivance of fixed judicial formulæ, we are naturally led to refer it to an imitation either of the ancient or more modern system of their predecessors. Yet, whether it were the result of such adoption or the fruit of original invention, it is certainly not easy, nor perhaps very important, to decide.

NOTE (3). See p. 94.

Ejectment, however, has been latterly often ranked as a *mixed* action, (c) because the plaintiff has judgment for specific recovery of the term itself, as well as nominal damages for the ejection. With deference, however, it is conceived that the class of an action depends not on the form of judgment, but on the form of writ and declaration; and that the question is, not whether specific recovery be *adjudged*, but whether it be *claimed* in the form of the proceeding. (See the definition of real and mixed actions, *supra*, p. 61.) Now, it is clear that, in the form of writ and declaration, an ejectment is no more than a species of the action of trespass; and as such it has been most anciently considered. *Ejectione firmæ n' est que un action de trespass en son nature, etc.* Fitz. Abr., tit. Eject., firm. 2, cited 3 Bl. Com. 200.

NOTE (4). See p. 100.

The mode of making the objection of the want of an original writ is by writ of error on the judgment; but no writ of error will lie in respect of such objection if the judgment was obtained upon a *verdict*.

(2) Brissot, *ibid.*, lib. V, XL, LIII; Voet ad Pandect., lib. II, tit. XIII, sec. 2.

(a) Inst., lib. IV, tit. 6; Car. Sigon. de Judiciis.

(b) Vide Inst. and Voet., *ubi supra*.

(c) Vide 3 Bl. Com. 199.

It is to be observed that, when this objection occurs in the common pleas, where the *præcipe* and *capias* are framed as in trespass, an original writ prepared according to such *præcipe* and *capias* will not suffice unless the action brought be really trespass; but an original *adapted to the action* must be obtained (which, as there is no *præcipe* to warrant it), can only be done by petition to the master of the rolls. (d)

NOTE (5). See p. 101.

That the parties appeared *personally in court* in the time of Hen. 2 seems sufficiently proved by the following passages in Glanville: *Utroque litigantium, apparente in curia, petens ipse loquelam suam et clameum ostendat, in hunc modum — Peto versus istum H., etc. Audita vero loquela et clameo petentis, in electione ipsius tenentis erit, se versus petentem defendere per duellum, etc. (e) Utroque præsentem in curia, is qui petit, jus suum in hæc verba versus adversorium suum proponat, Peto, etc. Audito autem clameo, etc. (f)* The forms of expression which occur in Bracton in the time of Hen. III. everywhere lead to the same conclusion. For example, *comparentibus* tam petente quam tenente, *petens actionem qua agere velit, et intencionem suam, proponere debet coram Justitiariis, etc. Et audito* Brevi de Recto, *dicat sic petens vel ejus advocatus in præsentiam Justitiariorum pro tribunali residentium. Hoc ostendit vobis A., etc. (g)*

It is said that it was the statute of Westminster 2 (13 Ed. I., ch. 10) which first gave the general liberty to all persons of suing and defending by *attorney*; and that, before that statute, a special warrant from the crown for that purpose was required. (h) It seems, however, that this is only to be understood of *appearance* by attorney, and not to the conduct of the suit by attorney *after appearance once made*. For it is clear that long prior to the 13 Ed. I., and even in the time of Glanville, a party might, upon appearance first made by himself in person, appoint a *responsalis*, whose office, though in some respects dif-

(d) 1 Sel. Pract. 69; Ibid., Introd. xlv.

(e) Glan., lib. 2, ch. 3.

(f) Ibid., lib. 4, ch. 6.

(g) Bract. 372 b.

(h) 1 Tidd, 66 (4th ed.); Gilb. C. P. 23, 26; 2 Reeves, 166.

ferent, was in substance the same with that of an attorney — to represent him during the subsequent progress of the cause; “ad lucrandum vel perdendum pro eo.” (i) And it is not said by Glanville that this required a warrant from the crown. (k)¹

NOTE (6). See p. 101.

For proof that in the time of Hen. II. and Hen. III. the pleading was *oral*, it will be sufficient to refer to the passages cited from Glanville and Bracton in the last note, and to observe that not the least allusion is made in either author to the use of written pleadings — the introduction of which is generally supposed not to have taken place till the middle of the reign of Edward III. (l)

NOTE (7). See p. 101.

As to the practice of oral pleading among the Lombards, see Muratori, in a note to his edition of the *Leges Langobardicæ*, (m) where he says that the pleadings among that nation appear to have been *non scripto, judici, tradita, sed petitione verbali pronunciata coram iudicibus*. As to the *German tribes in general*, comprising the Franks, see the *Elementa Juris Germanici* (n) of Heineccius, who says: *formulas non scriptas offerbant, sed viva voce præcinebant*.

NOTE (8). See p. 102.

The use of professional *pleaders* or *advocates* may be traced, among some of the continental nations, to a period extremely remote. The Lombards had the following law: *Si forsitan aliquis per simplicitatem suam, causam agere nescit, veniat ad placitum, et si Rex aut Judex præviderit quod veritas sit, tunc debeat dare ei hominem qui causam ipsius agat.* (o)

In the *Francic Formulæ apud Lindenbrog*, contained in the *Capitularies* by Baluzius, there is a record of a cause between a bishop and a private individual, where the bishop pleads by his *advocate*, and the other in his own person.

(i) Glan., lib. 11, ch. 1.

(k) *Vide* 8 Rep. 58 b, *acc.*

(l) 8 Reeves, 95.

(m) Murat., *Script. Rer. Ital.*, vol. I.

(n) Lib. III, tit. IV, sec. CLVI.

(o) *Leges Langobard. apud Lindenbrog*, 630.

¹ See note, *post*, p. 517.

In the Assises de Jerusalem, one of the most curious and important relics of the jurisprudence of the middle age, and fully recognized as an authentic compilation from the laws of France, made towards the close of the eleventh century, (*p*) we have a full account of the office, duties and proper qualifications of a *pleader*: Doit chascun de ceaus qui veont pleideer en la haute court, demander *conseill* au seignor, avant que il comance a pleideer. Il doit demander au seignor, a conseil, le meillour pleideoir de la court a son escient, se il est pleideoir ou se il ne l' est; pour ce que se il ne est pleideoir, que son conseil li sache sa raison garder et sa querele desreigner de ce dont il est requerior, et deffendre de ce dont il est deffendoir, et se il est pleideoir, pour ce que il ait plus de conseil, qu'il n'est nul si sage pleideoir, qui ne puisse bien souvent estre averti el plait de ce que bon li est, par un autre pleideoir o lui; que deus pleideoirs savent plus que un, etc. Ch. ix. . . . Qui a conseil et se veaut clamer d'ome ou de feme qui est present en la court, il doit faire dire par son conseil, au seignor, si que celui de qui il se clame ou veant clamer, l'oye, Sire tel se clame a vous de tel chose, et en veaut avoir droit par vous et par la court; et le nome, et die quoi il se clame, et as plus briefves paroles que il pora, face son clame, etc. Ch. xxvii. Il convient a celui qui est bon pleideoir et soutill, que il soit sage de son naturel, et que il ait esprit sein, et soutill engin, et que il ne soit doutif, ne esbay, ne hontous, ne hatif, ne non chaillant el plait, ne que il ait s'entente ne sapencee aillors tant com il pleidoie, et que il se garde de se trop corroucer ne agrier ne ehmourir en pleidoiant. Ch. xxiv. As a translation of this barbarous dialect may save the reader some trouble, the following very literal one is offered: "Every person about to plead in the supreme court ought, before he begins, to pray the lord to appoint him counsel. He ought to pray, for his counsel, the best pleader in the court; and this whether he is himself a pleader or not; because, in the latter case, he will need counsel to defend his right, and establish his claim or defense; and even in the former he will do well to have counsel, since there is no pleader so wise that he may not be often advised, on his pleading, by another pleader, as two pleaders know more than one, etc. He who

(*p*) See the opinion of Mably, in his *Observations sur l'Histoire de France*, vol. 2, p. 246.

has counsel, and wishes to make claim on some man or woman present in court, ought to say by his counsel to the lord, so that the other party may hear: Sir, such an one makes, before you, such a claim, and hopes to obtain justice in that behalf from you and the court; and then he should say what he claims, and in the shortest way possible, etc. A good pleader ought to have good sense, a sound understanding and a subtle genius; he should be free from the faults of indecision, timidity, false shame, haste and nonchalance; while he pleads he should keep his attention from wandering to any other subject, and should also take care to avoid undue heat and asperity." Some of these admonitions seem to deserve the attention of the nineteenth, no less than the eleventh, century.

The use of advocates was not confined to the Franks and Lombards. It obtained, at the same period, among the continental nations in general. Heineccius speaks of them as generally allowed throughout the German tribes, though under permission to be previously obtained from the judge, which, as he incidentally observes, explains the modern practice of not allowing all persons indiscriminately to plead causes, but confining the privilege to a certain number appointed by authority. (q) With respect to the Franks in particular he says: In foro litigantibus eo magis opus erat jurisperitorum auxilio, quo pluribus formularum ac sollemnitatum tricis, implicata erat eorum jurisprudentia; et quo facilius in his verbis labi possunt homines plebei, et aliis distracti negotiis. (r) He makes a similar remark as to the Lombards: Quum enim et hoc gens paullo plus tribueret, juri subtiliori, et formulario, homines plebei et harum rerum imperiti, vix poterant advocatorum jurisperitorum operâ carere. (s)

Hachenberg also lays it down as a general feature in the judicial system of the Germans of the middle ages: Aderant in judicio *advocati*—quos Clamatores et Ferendarios priscae leges vocant—qui causas litigantium nuda simplicique oratione, sine ullo verborum circuitu, tractare jubebantur. (t)

In England it appears that there were persons learned in the

(q) Elem. Jur. Germ., lib. III, tit. II, sec. XXIX.

(r) Ibid., sec. LXXXII.

(s) Ibid., sec. LXXXIII.

(t) Hach. Germ. Media, p. 97.

law, and skilful in pleading causes, at least as early as the reign of William Rufus; (u) and Bracton makes express mention of *counsel*, *pleaders* and *advocates* in the reign of Hen. III. (x) And not only were such professional persons employed, but (as stated in the text) the rule seems to have been already established excluding all but regular advocates or barristers from pleading in causes in which they were not personally concerned. This point appears to be sufficiently proved even by the following extract from the Placitorum Abbreviation—a compilation published a few years since, from our earliest judicial records: Abell. de Sancto Martino venit et narravit pro Episcopo. *Et non fuit Advocatus. Ideo in misericordia. Custodiatur.* (y) And additional evidence of the same proposition is supplied by the following curious passage in the Vitæ viginti trium Sancti Albani Abbatum, by the historian, Matthew Paris—written about the same period with the preceding extract. After complaining of certain oppressions which the abbey had sustained from a person protected and encouraged by John Mansel, the historian proceeds: Nec quicquam juris vel ultionis assistente memorato Johanne Regis lateribus et conciliis, potuimus obtinere. Quinimo, metus et persuasio ipsius Johannis, omnium Justiciariorum et placitantium Advocatorum (quos Banci narratores, vulgariter appellamus) ora penitus obturavit. Ita ut multo totiens oportuit Dominum Willielmum tunc cellarium (virum scilicet circumspectum et facundum) suum sermonem et querelam in persona propriâ coram Justiciariis, imo etiam coram Rege et Barnagio proponere. Et protestati sunt Justiciarii, secretius in aure dicti Domini Willielmi instillantes,—quod duo tunc temporis in regno dominabantur—scilicet Comes Richardus, et Johannes Mansel—contra quos non audebant sentire. (z)¹

NOTE (9). See p. 102.

All the authorities prove that questions of law have at all times been the exclusive province of the judges. Thus, in the Placitorum Abbreviatio, there is an entry, in the sixth year

(u) 1 Reeves, 228.

(x) Bract. 412 a, 373 b.

(y) Plac. Ab. 137; Kanc., rot. 22 (temp. 28 Hen. 3).

(z) Matt. Par. Hist., p. 1077.

¹ See note, *post*, p. 517.

of Richard I., that, *sub iudicibus lis et contentio fuit, utrum carta prædicta debet teneri versus puerum qui infra ætatem, etc.* (a)

And again, in the fourth year of King John, the jury, upon an inquisition, declare: *non pertinet ad eos de jure discernere.* (b)

NOTE (10). See p. 103.

This phrase, of *issue*, occurs at the very commencement of the Year-books, but the author has not traced it to an earlier period. In some instances the expression, *isser d'empler*, occurs, which may be translated to *get out of*, or *finish the pleading*, and clearly marks the meaning and derivation of the term *issue*.

In the reign of Edward IV. we find the Latin term thus regularly defined: *Exitus idem est quod finis, sive determinatio placiti.* Year-book, 21 Ed. IV., 35.

It is observable that the parallel word *fin* appears to have been used in the same sense in Normandy. See Commentaries de Terrien, lib. IX, ch. XXVI.

The terms, *issue en ley* and *issue en fet*, occur as early as the third year of Edward II. See the Year-book, 3 Ed. II., 59.

NOTE (11). See p. 104.

The origin of the practice of *recording* (another peculiarity of the English law) appears to have eluded our legal antiquarians as much as that of the Brevia; but it is, no doubt, referable to the same source. The term *record* is itself, in its immediate derivation, French; and the law of records is copiously discussed, under that name, in the Grand Coustumier, the most ancient depository of the Norman customs. The manner in which it is there treated might alone be sufficient to show that France was its native soil, and that it had not been adopted from the English courts; not only because no allusion is there made to any recent introduction of the practice, but because the practice appears, in the Norman courts, in a shape obviously more consonant with the original meaning and derivation of the term than that which it bears in

(a) Plac. Ab. 5; Warr.' temp. 6 Ric. 1.

(b) Plac. Ab. 40; Linc.' temp. 4 Johan.

England. For it appears that, in the Norman law, *recorder* anciently signified to *recite* or *testify on recollection*, as occasion might require, what had previously passed in court; and that this was the duty of the judges and other principal persons who presided at the Placitum — thence called *record-eurs*. On the other hand, we find faint vestiges only of this, the proper and ancient meaning, existing in England. Of these vestiges, one example occurs in our phrase of *recorder*, as applied to a borough judge, which is plainly a derivative or secondary application of the Norman word *recordeur*; and another that may be mentioned is the principle anciently recognized, *that the record is properly not in the parchment, but in the breast of the judge*. Thus we find it said in the Year-book, 7 Hen. VI., p. 29: *Le Record est tout temps en le cœurs de Justices, et le Roll n'est forsque remembrance pur le melior suerty*. But what decisively removes all doubt as to the national character of this judicial practice is, that while no trace of it is to be discovered among the Anglo-Saxons (for their loose historical notices, now extant, of some few important controversies, are evidently of a quite different kind), (c) it existed in the law of France at large, at least as early as at the Norman conquest, and in a shape exactly similar to that which it bore in Normandy. It is one of the directions given to litigants in the *Assises de Jerusalem* (compiled as early as 1099, and presumably referring to a state of law some time established), that they should collect as many of their own friends as possible in court, and request them to be attentive to what is said with a view of enabling themselves to retain and *record* it properly at the time of judgment or trial. *Qui veaut tost son plait atteindre, il doit faire estre en la court, tant de ses amis com il pora, et prier les que il soient ententis as paroles qui seront dites as plais, et bien entendre et retenir, — si que il sachent bien le recorder, as esgars et as connoissances, se mestier li est.* (d) It is also recommended that if there should be an adjournment of the pro-

(c) See the *Apographum Saxonieum*, published by Hickes (*Thes. Diss. Epist.*, p. 3), and the observations on that instrument by Hallam (vol. 2, p. 141). See, also, the plea in the County Court, between Gundulf and Pichot (Hickes, *Thes. Diss. Epist.* 33), and the plea of Pinenden, in the County Court, in the reign of William I., mentioned by Lord Coke (*preface* to 9 Rep.) — the narratives of which are all in the same style.

(d) *Assises de Jerusalem*, xlv.

ceedings and a farther day appointed for the hearing of the parties, both the plaintiff and defendant should take care to *put down in writing* the nature of the claim that has been made, the day and place of the adjournment, and the names of those who were present at the first hearing; and the plaintiff is advised to rehearse this writing, before the adjournment day, to such of those persons as he considered most friendly to himself, in order to refresh their memories and enable them to testify (*recorder*) at the adjourned meeting if it should be necessary, both the day and place of the adjournment, and the words in which the claim or other allegations were first made, it being assigned as a reason for this particularity that a variance from the claim first made would entitle the defendant to a new enlargement of the time for answering. (e) It is easy to conceive, though not to trace, the progress by which the occasional memorandum thus drawn up by the Francic pleader, to confirm the recollection of his judges, took the shape of an official contemporaneous minute of the proceedings, and no longer merely subordinate to a record or judicial report,— became itself invested with that name and character. Whether this change had fully taken place at the date of Glanville's treatise (in the reign of Hen. II.) that work does not enable us accurately to decide. He speaks, indeed, frequently of records, and lays down the maxim that the curia regis and no other court was properly and generally a court of record; (f) but it is not clear whether the written memorial, though already designated as the record and officially prepared, was made contemporaneously with the proceedings themselves or considered as intrinsic evidence of them, or in any other light than as an aid to the memory of judicial reporters. However we find that at least very shortly *after* this period the practice of recording, in the present sense of the term, was in full operation. The series of record, now extant, begins with the reign of Ric. I. (g) Curious extracts from some of the earliest of them have been printed and are to be seen in the Placitorum Abbreviatio.

The following passage, in an able publication, confirms the

(e) Ibid., xlix.

(f) *Scilendum quod nulla curia recordum habet generaliter præter curiam domini regis.* Glan., lib. 8, ch. 2.

(g) See the Report of the Commissioners on Public Records.

account that the author has above given of the origin and true meaning of *recording*. In reference to the laws of the Scandinavians it is observed: "No record or register authenticated the judgment of the court, which was preserved only by the recollection and knowledge of the judges who pronounced the decree, or of the assembled people who ratified the sentence. This usage of oral pleadings and of proving legal proceedings by oral testimony might be thought to be inconsistent with the assumption of the antiquity of written laws in Scandinavia, did we not know that the same practice was adopted by other systems of jurisprudence which are more familiar to us, such as the Custumal of Normandy and the assizes of the kingdom of Jerusalem. In Normandy a judgment pronounced by the king, sitting as Duke of Normandy, was *recorded* by his testimony added to that of one witness, or the royal judge might substitute three other witnesses in his stead; seven witnesses were required for the *record* of the exchequer of the assise. In these proofs it is clear that the compilers of the Custumal did not contemplate the production of any written document as evidence of past decrees or proceedings. The recorders swore as to what they had heard and what had been said," etc.—*Edinburgh Review* for August, 1820

NOTE (12). See p. 104.

It is to be observed, on the subject of suing, appearing, or defending by attorney, that there are certain persons, viz.: *infants, married women* (when sued without their husbands), and *idiots*, who are incapable of appointing an attorney to appear for them in court. The appearance and pleadings of such persons must consequently not purport to be by attorney, nor be so entered on record, whether an attorney be in fact employed or not. As for the mode in which the appearance and pleadings of such persons should be entered, see 1 Tidd, 68, 75; 1 Arch. Pract. 22.

NOTE (13). See p. 105.

There can be no pleading till appearance is effected. And, in a *personal* action, there can, till then, be no *judgment* given, nor other act done in court beyond the issuing of the process.

But in a *real* action, if the tenant hold out against the process and fail to appear, judgment will pass against him, and the demandant will recover the land. See Booth, 12, 19, 24, etc.; Com. Dig., Pleader (Y.); 2 Saund. 43, n. 1.

NOTE (14). See p. 107.

Besides these changes in the practical method of conducting the pleadings, it may be proper to notice the alterations that have taken place in the *tongue* or *language* used.

It has been the general opinion (*h*) that, among the badges of servitude imposed by the Conqueror, was the introduction of the French language by his command into the courts of justice; but an ingenious and learned writer (*i*) has controverted this notion with great plausibility, and doubts whether that language were used in the courts till a much later period. That the French was not introduced *by command* his arguments render extremely probable; but on the other hand, when the history of the conquest is recollected, there are many obvious reasons for supposing that the *curia regis*, or superior court of justice (which was itself of Norman introduction), (*k*) would follow in its pleadings the language of the conquerors, and the considerations adduced by this author are not sufficient to outweigh the probability of that supposition.

It is however clear beyond dispute, that whatever was the most ancient language of the *pleading*, the *record* was, from the earliest period to which that kind of document can be traced, in the Latin language. For this it is sufficient to refer to the still extant series of records from whence the *Placitorum Abbreviatio* is extracted; though Blackstone seems to have fallen into an error on this subject and to have supposed that the enrolment in Latin began with the statute 36 Ed. III., ch. 15, and in pursuance of its provisions. (*l*)

It is clear, too, that the *pleading* was in French, if not from the Conquest, at latest from the time of John or Edward I., (*m*) and so remained till, by the statute of 36 Ed. III. (st. 1, ch. 15),

(h) 2 Reeves, 449; 4 Bl. Com. 416.

(i) 1 Reeves, 46.

(k) See *Law Tracts*, by Mr. Luders.

(l) See 3 Bl. Com. 518, 519.

(m) Luders, *ubi supra*.

it was enacted that thenceforth the pleading should be no longer in French, but in English, and should continue to be enrolled or recorded in Latin. Afterwards, on the introduction of paper pleadings, they followed, in the *language* as well as in other respects, the style of the record, and were therefore drawn up in Latin. This continued to be the practice till a period so late as 4 Geo. II., ch. 26, when it was provided *that both the pleadings and the record should thenceforward be framed in English*, and it is in this language that they have since been drawn; the ancient terms of art and forms of expression, which had been so long known exclusively in a French and Latin dress, being now literally translated into English, but, with that exception, remaining undisturbed.

NOTE (15). See p. 107.

The practice of framing the allegations in the cause according to technical rule and method, or, in other words, the science of pleading, was no doubt derived from the same system of jurisprudence with the writ itself, viz.: from that of Normandy. *Vide supra*, note (2). It is certain, at least, that the use of stated forms of pleading is not to be traced among the Anglo-Saxons; and the general account given by the learned Hickes of *their* manner of litigation is as follows: Quisque causam suam *sine solennioribus juris formulis*, vel ipse agebat, vel causidicum et patronum sibi adscivit; quem amicitia, quem propinquitas, quem charitas, aut benevolentia,—vel denique quem sors ipsa, nonnunquam,—obtulerit. (n) And the specimen he gives of the proceedings in a county court, in the time of Canute, (o) strongly corroborates the opinion that they were strangers to any regular or artificial forms of statement. On the other hand, it appears that such forms *were* known among that great family of continental tribes of which the Franks stood foremost in forensic refinement. Actor breviter proponebat actionem, simili fere formulâ quâ olim Romani uti solebant. Quemadmodum enim hi non prolixis libellis actiones intentabant, sed formulis utebantur, quas vel jure-consulti vel prætores prodiderant; *e. g.*, aio hunc fundum

(n) Hickes, *Thes. Diss. Epist.*, p. 8.

(o) *Ibid.*, p. 8.

qui in Campaniâ est, meum esse ex jure Quiritium — aio Titium mihi centum ex mutuo dare oportere, etc., ita simili brevitate magnopere delectatos esse animadvertimus majores nostros. Tales sane sunt formulæ agendi in lege. Alam., etc. (*p*)

NOTE (16). See p. 133.

An anonymous author, in Hargrave's Law Tracts, observes on this subject: "I do not blame them" (the king's bench) "for the *latitat*, or the exchequer for the *quo minus*. But I must say the first invention of these tricks was neither honest nor justifiable. However, they are established," etc.

He afterwards observes that these usurpations grew by slow degrees and crept silently into practice. "Who can show the time when this writ" (the *quo minus*) "first issued upon a mere surmise, or who can tell that man's name who was first arrested by a *latitat*, etc.? If these fictions had in their beginnings been opposed and withstood, I cannot think it possible that the judges would have countenanced so gross a falsehood." (*q*)

NOTE (17). See p. 134.

A *demurrer* cometh from the Latin word "*demorari*,"—to abide; and therefore he which demurreth in law is said he that abideth in law: *moratur* or *demoratur in lege*." (*r*)

We find from the year-books that the pleaders sometimes put themselves upon the judgment of the court, upon a matter of law, in the following form of words: "Nous *demurroins* en vos discretions si nous etions mest a respond," etc. (*s*) This expression clearly indicates the manner of the derivation.

NOTE (18). See p. 136.

This, it will be observed, is a narrower sense of the term to *plead* than it otherwise bears; for in its more general meaning, as elsewhere stated, (*t*) it imports making *any allegation in the cause*, and so taken would include the case of a *demurrer* or a *declaration*.

(*p*) Heinecc. Elem. Jur. Germ., lib. iii, tit. iv, sec. clvii.

(*q*) Harg. Law Tracts, p. 422.

(*r*) 1 Ed. 2, 8.

(*s*) Co. Litt. 71 b.

(*t*) *Vide supra*, note (1).

NOTE (19). See p. 136.

Exceptionum quædam sunt dilatoriæ, quædam peremptoriæ; et hæc est prima et brevis divisio. (u) This division was borrowed from the canon or civil law. Thus it is said by the Canonists: Est summa exceptionum divisio, quod aut sunt dilatoriæ, aut peremptoriæ. (x) And it is laid down in the Digest: Exceptiones aut perpetuæ et peremptoriæ sunt, aut temporales et dilatoriæ. (y)

NOTE (20). See p. 136.

"Pleas are variously distinguished. The more general division of them is that of being dilatory or peremptory; or they are, first, pleas in *abatement*; secondly, such as *suspend* the action; or thirdly, such as *bar* the action forever." (z)

"The plea is either to the *jurisdiction* of the court, or *suspending* the action, as in the case of parol demurrer, or in *abatement*, or in *bar* of the action." (a)

The pleas to the *jurisdiction* are frequently mentioned as pleas in *abatement*, but inaccurately; for in their *form* they are not pleaded as grounds for *abating the writ*, but for *refusing to answer in the court* in which the action is brought. It is true that in their *effect* they abate the writ, for they defeat the action; but the case is the same with pleas in bar, which are yet essentially distinguished from pleas in abatement. "A plea to the jurisdiction is not properly a plea in abatement though in its consequence it be so, and therefore is to have its proper conclusion, as *respondere non debet*, or *si curia cognoscere velit*, and not *quod billa cassetur*." (b)

All dilatory pleas, including those in *suspension*, as well as pleas to the *jurisdiction*, are sometimes inaccurately classed as pleas in *abatement*.

NOTE (21). See p. 138.

Parol demurrer may be founded on the nonage of *either* party in some *real* actions. In *personal* actions it extends to

(u) Bract. 399 b.

(x) Corvin. Jus. Canon., lib. 3, tit. 32.

(y) Dig., lib. 44, tit. 1, sec. 3.

(z) Bac. Ab., Pleas, etc. (A.).

(a) 1 Chitty, 243. See, also, Bac. Ab., *ubi supra*; Bract. 399 b.

(b) Bac. Ab., Pleas, etc. (E.) 2. See 5 Mod. 146; Carth. 363; 1 Salk. 237.

the case of the *defendant* only, and that in very few instances. See as to parol demurrer, Bac. Ab., tit. Infancy and Age (L.).

Another plea which operates in suspension of the suit is that of *aid prayer*; as to which see Com. Dig., Aide (B. 5), (B. 6); Booth, 60; 2 Bos. & Pul. 384.

Excommunication of the plaintiff is another plea in suspension. See 1 Chitty, 450; Reg. Plac. 179, 180.

NOTE (22). See p. 139.

A plea in abatement is called by Bracton *exceptio ad breve prosternendum*; (c) and is described, about the same time, in French, as *exception pur brefe abatre*; (d) whence the words *abate* and *abatement*.

Cassare was another word applied, as well as *prosternere*, to express the abatement of the writ; (e) and from *cassare* is derived to *quash*, as to abate from *abattre*.

NOTE (23). See p. 142.

Originally, the pleas to the *person* were not considered as plea in abatement of the writ; for they are classed by Bracton and others as distinct from the *exceptiones ad breve prosternendum*. And indeed at this day they are pleaded (as observed in the text), not as reasons for *abating the writ*, but for *not answering*; (f) and it seems, therefore, that they are improperly classed as pleas in abatement. In more modern times, however, they have been uniformly so ranked and considered; (g) and they have the same effect, and are subject to the same rules, with pleas in abatement properly so called.

NOTE (24). See p. 145.

We may here take occasion to notice two rules, not properly of *pleading*, but of *practice*, by which the use of dilatory pleas is considerably restrained.

First, they must be verified by affidavit; or, at least, some

(c) Bract. 431 b.

(d) Britton, 43.

(e) See Hengham's Summa.

(f) Co. Litt. 128 a; Com. Dig., Abatement (L. 12). And see the example, p. 142.

(g) See Doct. Pl. 1.

probable matter must be shown to the court to induce it to believe that the fact of the plea is true. This is by 4 Ann, oh. 16, sec. 11. Secondly, they must be pleaded within four days inclusive after delivery or notice of declaration, unless the declaration be delivered or filed after term, or so late in the term that the defendant is not bound to plead to it in that term; in both which cases the defendant may plead within the first four days, inclusive of the next term. This is by different rules of court. (A)

NOTE (25). See p. 146.

A plea in bar is called by Bracton, after the civilians, *exceptio peremptoria*. In the French of Britton it is described as an *exception, pur barrer le pleintyfe, de sa demaunde*. (i) It is observable that the terms *barrer* and *barre* were in common use in the law-language of France in the year 1270, (k) which is about the same period when they first make their appearance in the English pleading.

NOTE (26). See p. 146.

Traverse is the most proper and ancient term. (l) In the modern language of pleading, however, *deny* is often substituted for it; and *pleas in denial* is a term often used instead of *pleas by way of traverse*. The reason is that *traverse* is a word that also occurs in a more limited sense, being often applied to a *particular form of denial*, of which there will be occasion, in the course of this work, to speak; and the word *deny*, as preventing confusion, is therefore usually adopted as the more convenient expression for the general idea. In this treatise, however, denial in general is called by its proper appellation of *traverse*; and the particular kind of denial above mentioned is denominated a *special* or *formal traverse*. Any confusion is thus sufficiently avoided, and the regular and ancient terms of art are preserved.

(A) 1 Tidd, 577; 2 Arch. Pract. 1, 2.

(i) Britton, 92.

(k) Ducange, Gloss., verbo *Barre*.

(l) See 1 Chitty, 536, and the authorities there cited; Bac. Ab., Pleas, etc. (H.); Finch Law, 396, 397.

NOTE (27). See p. 151.

As a party who makes a statement of fact is said to *plead*, by way of distinction from *demurring*, so such statement or allegation is in strictness called a *plea*; and when opposed to the declaration is denominated a *plea* to the *jurisdiction* in *suspension*, in *abatement* or in *bar*; at subsequent stages, a plea by way of *reply*, by way of *rejoinder*, etc., according to the stage at which it occurs. But as the name of *plea* is, in practice, generally understood to refer to that particular answer in fact which the defendant opposes to the declaration, and to that only, the word *pleading* will (to avoid ambiguity) be substituted, in this work, to express a statement of fact in general, as opposed to a demurrer.

NOTE (28). See p. 151.

The civilians and canonists described their pleadings in a similar manner, viz., as *intentio*, *exceptio*, *replicatio*, etc. Dig., lib. 44, tit. 1, sec. 2; Corv. Jus. Canon., lib. 3, tit. 32.

NOTE (29). See p. 154.

Nothing has been here attempted but a *practical* explanation of the manner of coming to issue. If considered in a view to its *abstract principle*, it will be found to consist in an application of that analytical process by which the mind, even in the private consideration of any controversy, arrives at the development of the question in dispute. For this purpose it is always necessary to distribute the mass of matter into detached contending propositions, and to set them consecutively in array against each other, till, by this logical conflict, the state of the question is ultimately ascertained. This ranks, in the present day, among those ordinary logical operations which it is easier to practice than to define, and which it would be superfluous to attempt to reduce to scientific rule. It was, however, as applied to the purpose of forensic disputation, a very favorite topic with the ancient writers on dialectics and rhetoric, and there was no subject connected with these sciences on which they bestowed more elaborate attention. *Status excogitandi*, says Sigonius, atque eo probationes omnes

conferendi, artificium, in libris oratoriis, multis verbis est demonstratum; neque enim in aliis præceptis, antiqui rhetores, tam Græci, quam Latini, plus studii aut operæ consumpserunt. (m) The *question in controversy* is described, among these writers, by the different terms *χρεινομενον*, *summa quæstio*, *res de qua agitur*, *quæstio ex qua causa nascitur*, *judicatio*, and others of similar import, all expressive of the same general idea, though slightly distinguished from each other in their particular application. (n) When this question was developed, there was said to be a *status* or *constitutio*, *causæ*. Of these *status* there were many classes, according to the different kinds of questions which might arise, involving not only the distinction recognized in our pleading between questions of *fact* and of *law* (*status conjecturales et legales*), but additional distributions in *status finitivæ*, *translativæ*, and many others, corresponding with the various logical divisions under which the different subjects of civil dispute may be considered. As a specimen of this obsolete but curious learning, and, at the same time, as the best illustration of what is the natural progress of the mind in effecting that development of which we have spoken, the following passage of Quintilian deserves attention. In that part of his work which relates to the *dispositio* or the art of oratorical division and arrangement, after noticing the importance of a prudent selection of the point of argument and a discreet statement of the general question, and observing that the choice should be determined by the nature of the case which the orator was to support, he proceeds: "I will explain my own method in this particular, which I attained partly by precept and partly by the natural deductions of reason, and of which I never attempted to make a mystery. In all forensic controversies I took care, in the first place, to inform myself of all the different matters involved in the cause. I say in forensic controversies; for, as to the disputes of the schools, the operation is unnecessary, as they consist merely in the discussion of a few questions distinctly discriminated at the outset as the subjects for declamation, and denominated *θεματα* by the Greeks, by Cicero *proposita*.

(m) Car. Sigonius de Judiciis. See, also, Quintil., lib. 3, ch. 6; Cic. in Topic., ch. 25; Ger. Voësius Instit. Orat.

(n) Quintil., et Cic., *ubi supra*.

After thus placing, then, the whole matter of the controversy distinctly in my view, it was my habit to *analyze* it, as well on the part of my adversary as on my own. And first I applied myself to that which, though easily described, requires a peculiarly attentive performance,—I mean I ascertained what case it was the object of either party to make, and by what allegations such cases might be respectively supported. With this view, I began by considering what might be alleged by the plaintiff. This statement would necessarily either be admitted or denied on the part of the defendant. If admitted, no question could at that stage arise. I therefore proceeded to consider what would be the defendant's answer; and to this I applied the same dilemma of admission or denial by the plaintiff. Accordingly, sometimes the matter of the answer would be admitted; but at all events there would, at some period of the process, arise a contradiction between the parties; and it is then that the question in the cause is first ascertained. For example, *You killed such a man.* Admitted. We proceed. The defendant must now assign some reason for this act. *It was lawful to kill him, as surprised in adultery with my wife.* There is no doubt of the law; we must therefore seek, in some other point, the subject of contention. *The parties surprised were not committing adultery. They were.* This, then, is the question, and is a question of fact" (*conjectura*—i. e., *status conjecturalis*). "In some cases, however, there might be a farther admission. *They were in adultery, but you had no right to kill him, for you were an exile, and infamous person.* And here arises a question of law. On the other hand, if, to the first allegation, *you killed*, it had been answered, *I did not kill*, the question had been ascertained at the outset. By this kind of process is the matter in dispute, or main question in the cause, to be investigated." (o)

This oratorical analysis of Quintilian exhibits exactly the principle of the English pleading; and when it is considered that the logic and rhetoric of antiquity were the favorite studies of the age in which that science was principally cultivated, and that the judges and pleaders were, doubtless, men of general learning, according to the fashion of their times, it is, perhaps, not improbable that the method of developing

(o) Quintil., lib. 7, ch. 1.

the point in controversy was improved from these ancient sources. On the other hand, however, it seems not to have been wholly derived from them; for the same method will appear, in one of the following notes, (*p*) to have been substantially in the possession of the barbarous Franks and Lombards, with whom it was, presumably, a native invention. "Whatever merit," says Gibbon, "may be discovered in the laws of the Lombards, they are the genuine fruit of the reason of the barbarians, who never admitted the bishops of Italy to a seat in their legislative councils." (*q*)

NOTE (30). See p. 171.

Trial has been long used to express the investigation and decision of *fact* only; but would appear to have originally signified *decision* in general. For by Bracton, in the reign of Henry III., the word *triare* seems to be taken in that larger sense, Nunc dicendum ubi *trianlæ* sunt actiones civiles, etc. (*r*) And Britton applies the French word *trier* in the same way. Thus, in speaking of the assise of darreign presentment, he says, se il aveigne que ils se consentent en un clerke, sans faire *trier* le droit, etc. (*s*) As for the *origin* of the word *trial*, it appears by these quotations that it is, like almost every term of English law of French extraction, being derived from *trier*. (*t*) Indeed, on this subject, we shall find the observation of the learned Craig perpetually verified: Omnia vocabula, quæ vocabula artis dicuntur, quibusque hodie in foro Angli utuntur, Gallica sunt; nihilque cum Saxonica lingua, habent affine. (*u*)

NOTE (31). See p. 172.

Originally an action was triable only in the court where it was brought. But it was provided by Magna Charta, in case of the subject, that *assises of novel disseisin and mortancestor* (which were the most common remedies of that day) should

(*p*) *Vide post*, note (40).

(*q*) Decline and Fall, etc., vol. 8, p. 157.

(*r*) Bract. 105 a.

(*s*) Britton, 92.

(*t*) It is said by one writer, however, to be derived from the Saxon. See Ducange. Gloss., verbo *Triare*.

(*u*) Crag. Jus. Feud., lib. 1, d. 7.

thenceforward, instead of being tried at Westminster, in the superior court, be taken in their proper counties; and for this purpose justices were to be sent into every county once a year to take these assises there. (x) These local trials being found convenient, were soon applied, not only to assises, but to other actions; for by the statute of Nisi Prius (13 Ed. I., ch. 30), it is provided as the general course of proceeding that writs of venire for summoning juries to the superior courts shall be in the following form: *Præcipimus tibi quod venire facias coram justitiariis nostris apud Westm. in octabis Scti Michaelis, nisi talis et talis, tali die et loco ad partes illas venerint, duodecim, etc.* Thus the trial was to be had at Westminster only in the event of its not previously taking place in the county before the justices appointed to take the assises. This clause of *nisi* or *nisi prius* is not now retained in the venire; but it occurs in a subsequent part of the proceedings. (See the Entry of Judgment, § 97.) And it is this provision of the statute of Nisi Prius, enforced by a subsequent statute of 14 Ed. III., ch. 16, which authorizes at the present day a trial before the justices of assise in lieu of the superior court, and gives it the name of a trial *at nis prius*. (y)

NOTE (32). See p. 185.

The ancient law, indeed, provided one means of appeal from the verdict of a jury in certain cases, viz.: by writ of *attaint*; upon which there was a kind of new trial by twenty-four new jurors. (z) But this proceeding is now obsolete, and, indeed, is applicable only to a case where the jury knowingly and wilfully gave a false verdict.

NOTE (33). See p. 185.

The statutes of jeofails are so called from *J'ay faillé*,—an expression used by the pleader of former days when he perceived a slip in his proceeding. (a) The statutes of jeofails and amendment are: 14 Ed. III., ch. 6; 9 Hen. V., ch. 4; 4

(x) 1 Reeves, 246.

(y) For farther information on this subject, see 3 Bl. Com. 56; 1 Reeves, 246, 262; 2 Reeves, 170.

(z) See 3 Bl. Com. 402; 1 Reeves, 370; 2 Reeves, 117, 424; 4 Reeves, 262.

(a) 3 Bl. Com. 407; Termes de ley.

Hen. VI., ch. 3; 8 Hen. VI., ch. 12, 15; 32 Hen. VIII., ch. 30; 18 Eliz., ch. 14; 21 Jac. I., ch. 13; 16 & 17 Car. II., ch. 8; 4 & 5 Ann., ch. 16; 9 Ann., ch. 20; 5 Geo. I., ch. 13. (b)

[EDITOR'S NOTE.—This subject may be introduced by quoting a remark of Justice Doe in regard to statutory provisions affecting another subject: "With so much legislation on the subject as there has been in that country (England), and so much litigation upon acts of parliament, it was not strange that the bar and bench should finally lose sight of the common-law origin of the principle so many times enacted in different forms and carried out in different methods. . . . It seems to have been a result of the anxiety of parliament, that, instead of merely providing such new remedies and modes of judicial procedure as they deemed necessary for the enforcement of the common law, they repeatedly re-enacted the common law, until it came to be supposed that . . . the public were indebted . . . to the modern vigilance of parliament instead of the system of legal reason which had been the birthright of Englishmen for many ages. A mistake of this kind is an evil of some magnitude. It unjustly weakens the confidence of the community in the wisdom and justice of the ancient system and impairs its vigor." *McDuffee v. R. & R. Ry.* (1878), 53 N. H. 480.

To the same effect, but directly upon the subject of amendments, is the reports of the judges of Pennsylvania, an extract from which we will here recite.

In 1807, by an act of the legislature of Pennsylvania, the judges of the supreme court were required to examine the English statutes and report which were in force in that state, and which ought to be incorporated into the laws of the commonwealth. In the section of their report dealing with the statutes of amendments the judges said:

"The numerous statutes of amendments and jeofails, which from time to time have been enacted, as well as other circumstances, seem to countenance the inference that few amendments were authorized by the common law. It will be found, however, that many of the provisions of these statutes are merely declaratory of the existing law,—a circumstance by no means universal in those early times, when it seems that even statutes of the greatest consequence were little known to the generality of the people.

"The amendment of *form* in such a way as to attain the real merits and justice of the case is so congenial to the principles upon which all laws ought to be administered that it would be a foul blot upon the common law, and a subject of regret to the admirers of that system, if it really countenanced the absurd strictness which at one period prevailed on this subject.

"That fastidious circumspection observable in the courts formerly, in relation to amendments, is attributable to the tyrannical persecution of the judges, carried on by Edward I., about the eighteenth year of his reign, for the shameful purpose of replenishing his empty coffers. See *ante*, p. 11.

"As the statutes of amendments and jeofails do not extend to criminal cases, a fair opportunity has been afforded of ascertaining, by decisions of the enlightened and independent tribunals of modern times, the extent to

(b) 3 Bl. Com. 407; 2 Tidd, 650, 815.

which such amendments might be carried by the common law, which, in respect to amendments, makes no distinction between criminal and civil suits. Upon a review of these decisions it will be readily perceived that, according to the soundest and best established principles of the common law, amendments may be made to an extent that would have astonished and alarmed greatly, as well the bench as the bar, in ancient times."

See Roberts' Digest of British Statutes in force in Pennsylvania (2d ed.), pp. 27, 28.

The first great English statute to notice is Magna Charta, because it revives the Saxon laws as they stood at the time of Edward the Confessor, and the judicial remedies according to the course of the common law. See Blackstone's Law Tracts, p. xiii, Intr.

The first statute of Amendment, so named, was 14 Ed. III, ch. 8 (A. D. 1340). It provided for the amendment of the record defective by the misprision of a clerk.

The next is 9 Hen. V., ch. 4 (A. D. 1421), providing that the judges may amend records or process after judgment.

By statute 4 Hen. VI., ch. 8 (A. D. 1425), The above was made perpetual.

The next, and a very important one, is 8 Hen. VI., ch. 12 (A. D. 1429), providing that no judgment shall be reversed on error for errors which shall appear from interlineation, erasures, etc., but that the judges shall inquire into the facts and amend the record accordingly. This statute has been held to cure a variance between original writ and final process. *Thorpe v. Hook*, 1 Dowl. P. C. 501. See *Bicknell v. Wetherill*, 41 Eng. C. L. R. 837.

The statute of 8 Hen. VI., ch. 15, in the same year as the last above noticed, provided for amendment in returns of records and process of sheriffs, coroners and bailiffs, misprisions of clerks, etc.

The statute of 32 Hen. VIII., ch. 30 (A. D. 1540), recites the great slander to the common law on account of the strictness which had obtained in regard to amendment, and enacted the substance of all of the other statutes, and enlarged the power to amend for mistakes in form or substance, insufficient pleading, etc.

This was followed by 18 Eliz., ch. 14 (A. D. 1576), in which it was enacted that no judgment should be stayed or reversed by reason of any default in form in any writ, count, declaration, etc., or for want of any writ, or by reason of any imperfect return by sheriff or other officer. But this did not extend to action or information upon any popular or penal statute.

By 27 Eliz., ch. 5 (A. D. 1585), it was enacted that after demurrer judgment should be given on the merits without regarding defect or want of form in writ, declaration or other pleading, except those only to which the party shall specially demur; and further, that after demurrer the court should amend all imperfections before mentioned other than those to which the party shall specially demur.

This is the last of the English statutes in force in those states which date their common law from the fourth year of King Jas. I.

Stat. 21 Jac. I., ch. 13 (A. D. 1623), after reciting 32 Hen. VIII. and 18 Eliz., enacted further, that after verdict judgment should not be stayed by reason of variance in form only between the original writ and the declaration, or

by reason of misnomer of any of the jury, or by reason of there being no return upon the writs, if a panel of the names of jurors was annexed to the writ, or by reason of the name of the officer having the return not being set to the return, if it be proved that the writ was returned by such officer, etc.

By statute 4 Anne, ch. 16 (A. D. 1705), it was enacted that after demurrer judgment should be given without regard to omission or defect in any pleading except such as the party should demur to specially; (2) that all the statutes of jeofails should be extended to judgments entered upon concession, *nihil dicit* or *non sum informatus*; (3) attorney for plaintiff shall file his warrant, and likewise attorney for defendant; (4) that defendant in any action, and plaintiff in replevin, shall be allowed to plead as many matters as he may deem necessary; (5) that if such matter shall upon demurrer be judged insufficient, costs shall be given at discretion of the court; (8) providing for view of lands in question; (9) that no dilatory plea should be received without proof of the truth thereof; (12) that in an action of debt upon bill or judgment, payment of money upon such bill or judgment might be pleaded in bar of the action; (13) that if, pending an action upon bond with penalty, the defendant should bring into court the principal money with interest and costs, such defendant shall be discharged from the same; (17) actions for seamen's wages must be commenced within six years from time cause of action accrued; (18) but if the person entitled to sue for seaman's wages is at the time the cause of action accrued under twenty-one, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, then the period of six years shall be reckoned from the time of their coming of full age, discover, of sane memory, at large, or returned from beyond seas; (19) if any person shall be beyond seas at the time cause of action accrues against him, then the action may be brought within six years after his return. This great statute is the model for many of the American statutes upon the subject. See Starr & Curt. Ill. Stat., p. 273, ¶ 6.

By Illinois Practice Act (Starr & Curtiss, Ann. Stat., p. 1787, ¶ 24), at any time before judgment in a civil suit amendments may be allowed introducing any party necessary to be joined as plaintiff or defendant, changing form of action, and in any matter, either of form or substance, in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the claim, or the defendant to make a legal defense. And it is enacted that at any time before judgment the court in which an action is pending shall have power to permit amendments in any process or pleading, either in form or substance, for the furtherance of justice, on such terms as shall be just. Starr & Curtiss, p. 265, ¶ 1. And after judgment any defects or imperfections in matters of form may be rectified and amended by the court in affirmance of the judgment, so that such judgment shall not be reversed or annulled; and any variance in the record from any process, pleading or proceeding had in such cause shall be reformed or amended according to such original process, pleading or proceeding. Starr & Curtiss, p. 269, ¶ 2.

A principal object of all statutes of amendments and of joining of several counts, varying the form of statement, is to obviate the danger of a variance on the trial. In this respect, whatever may have been the former

strictness of the rule in the code states, the same liberality of statement is now allowed, and for the same reason, viz., the practical one heretofore pointed out. *Ante*, p. 310 et seq. See *Mahan v. Smitherman*, 71 Ala. 568, citing 1 Chitty, Pl. 198, and *Powell v. Gray*, 1 Ala. 77.

In a late Rhode Island case the court said the language of the judiciary act is merely declarative of a rule which has been practiced here and elsewhere, that the court in its discretion may permit amendments even in matters of substance which do not go to the length of changing the form of action or introducing a new or different cause of action. *Wilson v. N. Y. & N. H. Ry. Co.* (1894), 29 Atl. Rep. 300. See *Empire Ins. Co. v. Real Estate Trust Co.*, 1 Ill. App. 391.

Under the West Virginia code the court held that amendments should be allowed, limited only by the rule that the party could not introduce an entirely new cause of action not declared upon or intended to be declared upon, even though it might be such a one as might have been joined in the original declaration or complaint. *Snyder v. Harper*, 24 W. Va. 206.

While the authorities seem harmonious on the question that the statute of limitations cannot be evaded by amendment (*North C. R. M. v. Mouka*, 107 Ill. 340; *Guilford v. Adams*, 19 Pick. 376; *Ross v. Bates*, 2 Root, 198; *Cooper v. Waldron*, 50 Me. 80; *Sumner v. Brown*, 84 Vt. 195. See *Stephens v. Mudgett*, 10 N. H. 338, 84 Am. Dec. 155, n.), in Illinois it has been held that the parties may be substituted in part and entirely (*Dickison v. C. B. & Q. Ry.*, 81 Ill. 215; *United States Ins. Co. v. Ludwig*, 108 id. 514; *Smith v. C. M. & St. P. Ry.*, 86 Ia. 202); and it has even been held that after the trial had progressed to argument in an action brought in case, a new count in trespass might be added by amendment. *C. & P. Ry. v. Stein*, 75 Ill. 41. This case seems to apply the rule as liberally as in any jurisdiction. The form of action may be changed. *Meyer v. Wiltshire*, 92 Ill. 395; *Citizens' Gas Light Co. v. Granger*, 118 id. 266.

These statutes of their own force cure defect in form in the pleading or formal variances of proof, but do not aid a defective record. *Holmes v. Preston*, 70 Miss. 152; *Harris v. Shebeck*, 151 Ill. 288; *Merkle v. Bennington*, 68 Mich. 133. The trial court may of its own motion direct amendments. *Martin v. Good*, 111 N. C. 288. Or amendments may be ordered by the appellate tribunal. *Mitchell v. Railway Co.*, 82 Mo. 106; *Rigg v. Parsons*, 29 W. Va. 522; *Love v. Tinsley*, 82 id. 25.

The result of the power of amendment provided by the statutes, as construed by the courts in the light of the common law, is to entirely remove the baneful effects formerly attendant upon the distinction between forms of action. When we consider that under the code the case must begin and proceed upon a definite theory, and the theory is to be determined by the nature of the cause of action stated, tested by the common-law rules, and that the proof must correspond to the allegations, *e. g.*, a count for unjustly and intentionally injuring is not supported by proof of a negligent injury (*Harold v. Jones*, 98 Ala. 348), or proof of an implied contract will not sustain an allegation of an express one (*Aultman Co. v. Goldsmith*, 84 Ind. 547), we are enabled to judge whether or not the ancient system, as developed by ten centuries of Saxon thought, is founded in reason and logic, or owes its continued existence to the *prejudice* of those who will not learn.

The student of American procedure cannot spend his time to better advantage than in ascertaining in what instances the reformed procedure makes use of the distinction between causes of action which pervades the common-law system.

Once this is thoroughly understood and admitted in all its bearings, the way for a uniform procedure act is open and easy.

NOTE (34). See p. 188.

Without entering into the well-contested field of controversy on the question whether the method of *trial by jury* was of Anglo-Saxon or of Norman origin, it may be sufficient to sum up the result of the dispute thus: There is, on the one hand, some evidence of the occasional existence of an *inquisitio patriæ*, or inquisition by a *jurata* of twelve, in England, before the Conquest; though with what frequency it may have then occurred it is very difficult to determine. On the other hand, it clearly existed as an ordinary mode of decision among the Scandinavian ancestry of the Norman invaders. (c) The same species of inquisition also existed among the Normans themselves, (d) and was in force in Normandy at least as late as the year 1654; for in the *Commentaires de Terrien*, published in that year, it is said: *Enqueste est recognoissant de verité de la chose de quoy est, par le serment de douze chevaliers, ou de douze antres preudes hommes (probos homines) creables, et qui ne soyent pas soupçonneux.* (e) And the same author observes: *Par la coustume du pays, un faict ne chet point en enqueste, en tel cas (i. e., matiere hereditale) s'il n'est ou peut estre notoire au voisiné.* (f)

Whatever may have been the ultimate origin of this method of decision it is at all events clear that it was occasionally in use in this country at least as early as the reign of Hen. II.; for it is expressly mentioned by Glanville under the name of *Jurata patriæ sive visineti.* (g) But it is equally clear that it

(c) See, among other authorities, *Hickes, Thes. Diss. Epist.* 32, 33, etc. This author, at the same time, combats the opinion that the method was known among the Anglo-Saxons, and attempts to show that the passages cited in support of that opinion have been misunderstood. In this, however, he opposes himself to Coke, Spelman and Selden; and the authority of these great names is fortified by the coincident opinion of Mr. J. Blackstone.

(d) *Vide the Grand Coustumier*, lxxxiv, etc.

(e) *Comment. de Terrien*, liv. ix, ch. xxxiii.

(f) *Ibid.*, liv. ix, ch. xxvii.

(g) *Glan.*, lib. 9, ch. 11; lib. 7, ch. 16; lib. 5, ch. 4.

was not then in *ordinary* use. Prior to a certain law of Hen. II., not now extant, it seems that this mode of decision had belonged only to a *few specific cases*, the enumeration of all or most of which may be found in Glanville. But in the reign of that monarch the law above mentioned passed, authorizing the application of the *jurata patriæ*, or inquisition of twelve men, to certain questions of *seisin*, which appear before that time to have been decided by *wager of battel* only. This ordinance, like other laws of that day, (*h*) was called *assisa* or an *assise*; and when an inquisition by a *jurata patriæ* took place by virtue of its provisions, such inquisition was called a *recognition of assise*. The *recognition of assise* became so popular that suitors were led to adopt the same method by *mutual consent* or by advice of the court, (*i*) even for the decision of questions for which the ordinance of Hen. II. did not provide, and which they would otherwise have been obliged to settle by *wager of battel*. The proceeding, when thus instituted by consent of the parties or advice of the court, was called *jurata ex consensu*, to distinguish it from the regular *recognition of assise* appointed by law. This *jurata ex consensu*, which is the modern *trial by jury*, continually increased in favor from the time of Glanville, and at the date of Bracton's work had become the most ordinary method of deciding fact. (*k*)

NOTE (35). See p. 189.

The question of *mere right* has from the earliest period been decided by *wager of battel*, and at one time could be decided in no other manner. Afterwards, in the reign of Henry II., the assise or law of that monarch referred to in the last note gave the tenant in a writ of right the alternative of having this question tried either by *wager of battel* or a recognition by jurors to be selected by four knights; (*l*) while it appointed for questions of *seisin* (as already mentioned) a rec-

(*h*) See Co. Litt. 159 b.

(*i*) Tunc ex consensu ipsarum partium, tunc etiam de consilio curiæ. Glan., lib. 13, ch. 2.

(*k*) The same account of the establishment of trial by jury is given by Mr. Reeves, vol. i, 177, 384, and is perhaps stated in no other work with sufficient precision. A careful perusal of Glanville and Bracton will leave no doubt as to its correctness.

(*l*) Glan., lib. 2, ch. 7, 11; 1 Reeves, 126, 127.

ognition of a more ordinary kind; and as the latter obtained the name of a recognition of assise, so the former was called, by way of distinction from it, the *grand assise* (*magna assisa*). The question of mere right from this time continued to be exclusively determinable by *battel* or the *grand assise*; and either from its solemnity, or the difficulty that attended it in point of proof, (m) was never allowed to be tried by a common jury.

NOTE (36). See p. 191.

The possibility of being exposed to this disadvantageous method of decision, the *wager of law*, has long led plaintiffs to avoid the forms of action in which it is allowed. Accordingly *debt on simple contract* and *detinue* are much less frequently used than in ancient times, and have been nearly supplanted by *assumpsit* and *trover*, which are forms of remedy respectively applicable to the same cases, but not admitting that mode of trial.

The *wager of law* (*vadiato legis*), which, under different names and in different forms, prevailed over all Europe in the middle ages, was fully established, not only among the Normans but the Anglo-Saxons. The name, however, is clearly of Norman derivation; for in the old law of Normandy, *lex* signified a mode of proof or trial, and *vadiare* was to give pledge to produce such proof or meet such trial. Thus, the *Coustumier* speaks of the *lex apparens*, the *lex probabilis*, the *lex simplex* (otherwise called *deraisina*), as so many modes of deciding causes. (n) Now it appears, by the account given of the *lex simplex*, that it was equivalent to our *wager of law*; (o) and that the party who adopted this proceeding was said *vadiare legem simplicem*, or, more shortly, *vadiare legem*; (p) whence undoubtedly the term *vadiatio legis*, or *wager of law*, as used in the English courts. Though this deduction of the name be clear and indisputable, Lord Coke (whose derivations do not

(m) See Bract. 318 b.

(n) For example, it is said: *Sciendum est quod omnis querela de mobili possessione, cum res in causa deducta, decem solidorum usualis monetæ præcium non excedat, per legem simplicem habet terminari. Si vero dictum excedit præcium, per legem deducitur apparentem.* Grand Coust. lxxxvii. And again: *Est quedam lex quæ probabilis sive monstralis in laicali curia nuncupatur.* Ibid., cxxv. See, also, Ducange Gloss., verbo *Lex*, where it appears that the *wager of battel* was sometimes called *lex duelli*.

(o) Grand Coustum., lxxxiii, cxxvi.

(p) Ibid., cxxvi.

always satisfy the antiquarian) gives the following origin of the phrase, in which he is followed by Blackstone: "It is called *wager* of law, because of ancient time he put in surety to make his law at such a day; and it is called making of his *law*, because the *law* doth give such a special benefit to the defendant, to bar the plaintiff forever in that case." (q)

NOTE (37). See p. 191.

Such of the different modes of trial now in use as are of extraordinary and limited application are the relics of a very ancient system of deciding fact, established before the full introduction of *trial by jury*. (r) Though it would be foreign to the present purpose to attempt to explain fully the meaning and policy of this curious system, yet there is one general observation which throws so much light on that subject that it may, without impropriety, be here introduced. The observation relates to the defective state, during those barbarous ages when the foundations of this system were laid, of the proper and rational sources of judicial proof. In times when the arts of reading and writing were comparatively rare, and when parchment had not yet been superseded by the invention of paper, written documents were of course by no means so frequently in use as the occasions of life would require, even after making due allowance for the comparative paucity, at that period, of commercial transactions. This circumstance at once increased the necessity for resorting to living witnesses, and, at the same time, by rendering perjury less open to conviction, must have tended to diminish the security of that mode of proof. Whatever the cause, the fact is certain that perjury was at this era a crime of peculiarly frequent occurrence, and, consequently, oral testimony a species of evidence of the lightest and most doubtful kind. It seems evident, too, that in a scanty population there must have been considerable less publicity than in the present day in almost every kind of occurrence; and that while witnesses were, on the one hand, less to be depended upon, so, on the

(q) Co. Litt. 294 b, 295 a. And see 3 Bl. Com. 341.

(r) Considerable insight into this ancient system of trial may be obtained by an attentive perusal of the work of Glanville, the earliest and best authority. It is a subject, however, that has never yet been thoroughly elucidated.

other, they were less easily to be found. In this state of things it is not surprising that attempts should be made to strengthen this, the ordinary mode of judicial investigation, by such corroborative tests as the opinions and manners of the times might approve, or to supply the want of it by other kinds of probation. Thus the oath of the defendant himself, in opposition to the claim of his adversary, would, under such circumstances, naturally have but little weight. At the same time he might be unprovided with writing or witness. He was, therefore, by way of suppletory expedient, required to support his own oath by *wager of law*, that is, by the adduction of many other persons as his compurgators, who, though unacquainted with the transaction itself, knew the character of the party and had sufficient confidence in it to swear that they believed his assertion true. Thus, too, when this proof by *wager of law* was, from the importance of the question or for other reasons, deemed inapplicable, and that by witnesses alone considered insufficient, resort was often had to *judicial combat*, as the best means that offered itself for deciding between opposite assertions. (s)

With respect to the great prevalence of perjury at this period, the latest and one of the most able and accurate delineators of the middle ages thus notices that feature in the morals of the day:

"One crime, as more universal and characteristic than others, may be particularly noticed. All writers agree in the prevalence of judicial perjury. It seems to have almost invariably escaped human punishment; and the barriers of superstition were in this, as in every other instance, too feeble to prevent the commission of crimes. Many of the proofs by ordeal were applied to witnesses as well as those whom they accused; and undoubtedly trial by combat was preserved in a considerable degree, on account of the difficulty experienced in securing a just cause against the perjury of witnesses. Robert, king of France, perceiving how frequently men foreswore themselves upon the relics of saints, and less shocked

(s) In the time of Glanville the *wager of battel* was applied not only to the question of mere right, but to a great variety of other cases; and was one of the most general and ordinary modes of deciding fact. Thus, he says: *Probari solet res debita ex empto, vel ex commodato, generatim probandi modo in curia, scilicet per scriptum vel per duellum*. Glan., lib. 10, ch. 17.

apparently at the crime than at the sacrilege, caused an empty reliquary of crystal to be used that those who touched might incur less guilt in fact though not in intention. Such an anecdote characterizes both the man and the times." (t)

NOTE (38). See p. 208.¹

The only material authorities on the subject of pleading of date prior to the reign of Edw. I. are the treatise of Glanville, in the time of Hen. II.; that of Bracton, in the latter end of the reign of Hen. III.; and the Placitorum Abbreviatio, which contains extracts from the Records from Ric. I. to Edw. II. inclusive. From these authorities it would appear that the manner of pleading was extremely imperfect, and many of the most important rules of the science either unknown or but partially observed in practice so late as the end of the reign of Hen. III. On the other hand, the very earliest of the Year-books (which begin with the reign of Edw. II.) exhibit proofs that the pleading was by that time in a comparatively perfect state. It is therefore that the author has been led to consider the reign of Edw. I. as the era at which the manner of allegation may be said to have been first methodically formed and cultivated as a science.

It would be easy to produce numerous proofs that the pleading was very imperfectly regulated till the end of the reign of Hen. III. But the following will suffice:

Glanville gives scarcely any rule that can strictly be considered as a rule of pleading, though he is copious on subjects which would have led him to notice such rules had they existed. (u)

In the time of John we find instances of pleas which *neither traverse nor confess*. Thus, in answer to a fine, it is pleaded *quod si finis ille factus fuit per deceptionem et fraudem, factus, fuit, etc.* (x) Again, where a defendant had pleaded a deed made by the father of the plaintiff, the plaintiff replies, *quod cartam quam profert sub nomine patris sui, neo dedit, neo concedit, etc., sed qualiter carta illa facta fuit vel a quo, sem-*

(t) Hallam's *View of the State of Europe during the Middle Ages*, vol. 2, p. 456.

(u) Glan., lib. 12, ch. 14.

(x) Plac. Ab. 38; Bedd.. rot. 4.

¹ Note referred to in 1 Chitty, Pl., ch. 3.

per postquam facta fuit, presentavit pater ejus personam, etc. (y)

In the same reign numerous examples of the fault of *duplicity*, i. e., pleading several allegations in answer to the same matter, are to be found. Thus, in the assise of mortancestor, the tenant pleads that the demandant was seised himself, *post obitum* of the ancestor; and, by fine, of which he produces the cirograph, quitclaimed, etc., the land. The demandant replies: Quod ipse *nunquam fuit seisitus* de terra quam petit, nec unquam eam tenuit. Et inde ponit se super assisam, etc. *Et cum habuerit seisinam talem*, etc., bene ostendet quod *concordiam illam non fecit, nec facere potuit*. Et petit sibi allocari quod cirographum illud, non est factum in formâ aliorum cirographorum, etc., and so argues against its genuineness. (z)

In the same reign the fault of *argumentativeness* appears to have been common. Of this the following entry may serve as an example: Dicit quod Ranulphus *non potuit dare* illam terram in maritagio, *quia obiit inde seisitus*. Et inde ponit se super juratam. (a)

All these are clear violations of rules of pleading subsequently established and still in force, and appear to have encountered no objection from the opposite party.

In the reign of Hen. III. much attention certainly appears to have been paid to the manner of pleading, and Bracton not only makes constant reference to that subject, but has a division of his work expressly allotted to it under the head *De exceptionibus*. Yet, on careful perusal of that work, the most convincing proofs may be found that the regular and methodized plan of allegation, which we find soon afterwards established and which has since received the name of the *system of pleading*, was, in his time, not fully formed. For, without insisting much on the remark that the very title, *De exceptionibus*, is borrowed from the Pandects, and is rather applicable to the nature of the Roman than the English pleading, and that he often uses the appellations peculiar to the civil law, (b) it will be found that scarcely any of the more important and funda-

(y) Ibid. 92; Kent, rot. 15. And see 48 Linc., rot. 7; 89 Northumb., rot. 6, etc.

(z) Ibid. 88; Sussex, rot. 22. And see 48 Linc., rot. 7; 50 Buck., rot. 2; 50 Linc., rot. 5, etc.

(a) Plac. Ab., 79 Warr., rot. 2.

(b) For example, *exceptio iudicis non sui — exceptio falsi procuratoris*. Bract. 400 a.

mental rules of the present system are noticed by this author. Even the term "issue" does not occur, and, instead of it, is used the civil law term *litis contestatio*, (c) a phrase by no means exactly parallel, though expressive of the same general idea. The rule against duplicity, indeed, is given, but in such a form as to raise a doubt whether its true extent and object were understood by the writer. Si plures peremptoriæ (exceptiones) actionum concurrant, unam debet tenens proponere et probare, etc., quia si tenens cum duas peremptorias proponeret vel plures exceptiones, in probatione unis deficeret, posset recursum habere ad alias, et probare, *sicut posset se pluribus baculus defendere*; quod esse non debet, cum ei sufficere debeat tantum probatio unius. (d) Again, it may be observed that neither the rule obliging the pleader to traverse or confess, nor that against argumentative pleading, appears to have been perfectly established in the time of this author. Thus, he mentions it as one of the pleas to an appeal of rape: Quod anno et die quo hoc fieri defuit, fuit alibi extra ragnum, vel in provincia, in tam remotis partibus, *quod verisimile esse non poterit* quod hoc quod ei imponitur, fieri posset per ipsum. (e) And again, among the pleas to an assise, the following is mentioned: Eiberum tenementum *habere non potuit, quia non tenuit* tenementum illud nisi ad terminum annorum, etc. (f)

NOTE (39). See p. 209.

The *issue* is thus defined by Lord Coke: "Issue, *exitus*, a single, certain and material point issuing out of the allegations or pleas of the plaintiff and defendant, consisting regularly upon an affirmative and negative to be tried by twelve men;" (g) and thus by Heath, C. J.: "that point of matter depending in suit whereon the parties join, and put their cause to the trial of the jury." (h) These definitions, besides being too narrow, as extending only to questions of fact and to such questions of fact as are referred to one particular

(c) Bract. 373 a, 172 a, 435 b.

(d) Bract. 400 b. Something seems to be omitted in this passage, which renders its construction imperfect.

(e) Ibid. 148 a.

(f) Co. Litt. 136 a.

(g) Bract. 268 a.

(h) Heath's *Maxims*, ch. iv.

mode of trial, viz., that by jury, seem to be also defective in clearness and precision. The definition of the issue by Mr. Justice Blackstone is as follows: "When, in the course of pleading, they come to a point which is affirmed on one side and denied on the other, they are then said to be at issue." (i) Even this does not appear to be perfectly accurate, for it would include a point contradicted by *protestation*. (k) The definition by Finch is more unexceptionable. "An issue is, when both the parties join upon somewhat that they refer unto a trial, to make an end of the plea" (i. e., suit). (l)

NOTE (40). See p. 211.

We find in the Assises de Jerusalem (as to which *vide supra*, p. 454) the following directions to the pleader on the subject of brevity and precision: As plus *briefves* paroles que il pora, die sa parole — *car les plus briefves paroles et entendaument dites*, sont meaus entendues et retenues et recordées et jugees, et quant mestier, que les autres: i. e., let the pleader make his claim in the shortest form of words possible, and let him speak as intelligibly as he can, for the shortest and most intelligible expressions are the best heard and retained, and recorded and adjudged upon. (m)

The remark in the text may also be illustrated by the following curious specimens of the manner of pleading among the Lombards, as preserved in a compilation of undoubted authenticity:

"Petre, te appellat Martinus, quod tu malo ordine (i. e., *injuste*) tenes terram in tali loco positam. Illa terra mea propria est, per successionem patris mei. Non debes ei succedere, quia habuit te ex sua ancilla. Verè; sed fecit eam widerbora (i. e., liberam) sicut est Edietum, et tulit ad uxorem. Approbet ita, aut amittat." (n)

"Petre, te appellat Martinus, quod terra quæ in tali loco est, sit sua; tu eam detines. Etiam, quia possedi per xxx. annos. Verè possedisti, sed per chartam falsam quam dixisti patrem meum fecisse tibi. Non est verum. Ita. Probato." (o)

(i) 3 Bl. Com. 318

(k) As to protestation, *vide supra*, p. 277.

(l) Finch. Law, 396.

(m) Assises de Jerusa. xxx.

(n) Leges Langobard. ap. Muratori., Leges Liutpran., lib. VI, 58.

(o) Ibid., Leges Liutpran., lib. VI, 62.

"Petre, te appellat Martinus, quod tu dedisti sibi vadia de dare sibi unum solidum III. Kalend. Augusti. Non dedi ipsa vadia. Tunc ipse qui appellat, probet. Si non potuerit, ipse qui appellatus est, juret quod in tali tenore vadia non dedit." (p)

The following specimen is of a somewhat later era, when Lombardy had fallen under the Francic dominion:

"Petre, te appellat Martinus quod tu tenes malo ordine, terram in tali loco. Ipsa terra mea propria est, per chartam quam tu mihi fecisti; et ecce chartam. Ego feci ipsam chartam, sed per virtutem (*i. e., vim*). Non fecisti. Vis ei probare? Volo. Vadiate pugnam." (q)

These specimens of the pleading of a barbarous nation have drawn from a foreign writer of superior taste a warm eulogium: "Le formole dell' intentar le liti," says Denina, "erano sì semplici, e sì spiccie, e sì chiare, che non cedevano a quella sì giustamente lodata forma del procedere che regna tuttavia in alcuni tribunalli dell' età nostrà." (r)

NOTE (41). See p. 212.

Omnia hæc (says Heineccius, speaking of the pleadings of the Civilians and Canonists as opposed to those of ancient Germany) *non viva voce* proferebant, sed *scripta* offerebant judici; ex eoque nata est ingens actorum forensium moles — quum sæpè integris voluminibus, causam suam tueantur litigantes, quam olim, paucissimis verbis, non minus dextrè, perorabant. (s)

NOTE (42). See p. 212.

In Bracton, as observed in a former note, the attainment of the issue is called *litis contestatio*, which is a word used by the Civilians to express the same general idea. Thus, he says: Usque ad *litis contestationem*, — scilicet quousque fuerit præcisè responsum intentioni petentis, et ita quod tenens se posuerit in

(p) Ibid., *Leges Rachts*, ch. 1.

(q) Ibid., *Leges Ottonis II*, ch. 5. The above extracts are taken from the *Leges Longobardicæ*, with the *Formulæ Veteres* annexed, as published from ancient MS. by Muratori, in his *Script. Rer. Italic.*, vol. i. These laws had been previously published by Lindenbrog, but without the formulas.

(r) *Rivoluzioni d'Italia* di Denina, vol. i, p. 316.

(s) J. G. Heinecc. *Elem. Jur. Germ.*, lib. III, tit. iv, sec. CLVII.

magnam assisam; vel defenderit per Duellum. (t) And in another place: Non tenetur aliquis hæres de facto scilicet de disseysinâ antecessoris sui, quoad poenam disseysinæ, licet teneatur ad restitutionem; et hoc nisi *lis contestata* fuerit cum suo antecessore, etc. (u)

It may be worth while to observe here that Blackstone's idea of the meaning of this term of the civil law is inaccurate. He considers it as "a general assertion that the plaintiff hath no ground of action." (x) This, however, is not the sense in which it is properly or commonly used in the civil law, though it may occasionally have that meaning. It is clear that its usual signification is exactly that in which it is used by Bracton, viz., the development of the point in controversy, or, as it is now expressed, the coming to *issue*. "In common parlance, denying the truth of the defendant's exception, or, indeed, whenever parties come to direct affirmance on one side and denial on the other, is called a contestation of suit." (y) *Litis contestatio non aliud est quam intentio actoris, et contradictio seu depulsio rei; adeo ut ex actione et oppositâ peremptoriâ exceptione, consurgat; et comprehendat illud in quo tota controversia consistat.* (z) And Fortesque is express to the point; for, in treating of the method of proof in the civil law, he says: Si coram iudice contententes ad *litis perveniant contestationem*, super materiâ facti, quam legis Angliæ, *periti, exitum placiti* (the issue) appellant, *exitus hujusmodi veritas*, per Leges Civiles, *testium depositione, probari debet.* (a)

NOTE (43). See p. 215.

That juries were originally composed of witnesses, or persons cognizant of their own knowledge of the fact in question, seems to be sufficiently proved by the following authorities:

In an assise of darreign presentment, in the reign of Richard I., the jurors find a special verdict in these terms: *Assisa dicunt quod nunquam viderunt aliquam personam præsentari ad ecclesiam de Duneston, sed semper tenuerunt personæ, per-*

(t) Bract. 373 a.

(u) Ibid. 172 a.

(x) 3 Bl. Com. 306.

(y) Brown's Civil Law.

(z) Voet. ad Pandect., lib. V, tit. 1, sec. 144.

(a) Fortescue de Laud., ch. 20.

sona in personam, ut de patre in filium, usque ad ultimam personam quæ ultimo obiit. (b)

In an assise of novel disseism, in the same reign, there is the following entry: *Assisa venit recognitura si Adam de Greinvill et Willielmus de la Folie dissaisaverunt injuste et sine iudicio Willielmum de Weston de libero tenemento suo in Suto, post primam coronationem Domini Regis. Juratores dicunt quod non viderunt unquam alium saisitum de tenemento illo, nisi Willielmum de la Folie. Et quod nesciunt si Willielmus de la Folie dissaisisset eum inde vel non. Consideratum est quod alii Juratores eligantur qui melius sciant rei veritatem. Dies datus est eis ad diem Mercurii.* (c)

In the reign of John there is the following entry: *Juratores dicunt quod ecclesia Sanctæ Helenæ de G. nunquam fuit capella pertinens ad ecclesiam Sancti Michaelis super Wir quæ est de donatione Dom Regis; sed semper temporibus suis iudicaverunt illam esse matricem ecclesiam.* (d)

So, upon a question whether the plaintiff, claiming to be tenant by the curtesy, had issue by his wife, Bracton says: *Si dicant juratores quod bene viderunt eum seysitum et postea ejectum per tenentem, sed de aliquo puero nihil sciunt, quia mater obiit in pariendo extra comitatum, in remotis,— quia eorum veredictum insufficiens est, et quia ipsi ignorare possunt ea quæ fiunt in remotis, recurrendum erit ad comitatum, et ad vicinetum ubi mater obiit; et ibi facta inquisitione de veritate, terminetur negotium.* (e)

And see 2 Reeves, 270, where the doctrine in support of which these authorities are cited is distinctly laid down.

NOTE (44). See p. 217.

The author being the first who has attempted to develop the principles on which the system of pleading is founded, he is unable to cite any direct authority, either for the enumeration contained in the text of the objects which that system contemplates, or even for the account there given of the properties or qualities required in the issue.

(b) Plac. Ab. 3 Norfolk.

(c) Plac. Ab. 11 Wiltesir.

(d) Plac. Ab. 94; Lanc., rot. 3.

(e) Bract. 216 a.

Yet passages, sufficient to justify both the one and the other, may be easily collected from the books.

First, as to the properties of the issue.

Lord Coke defines the issue to be a "*single, certain and material* point, issuing out of the allegations or pleas of the plaintiff and defendant." (*f*) He considers these properties, therefore, to be of the very definition of the term; though, perhaps, they are more properly incidental to the issue than of its essential nature. So, it is laid down in Comyns' Digest, that the issue must be upon a *material* point," (*g*) and "must be upon a *single and certain* point." (*h*) So it is said by Lord Coke that the law "prefers and favors certainty, as the mother of quiet and repose, to the intent that either the court shall adjudge thereupon if the plaintiff demurs or that a *certain* issue may be taken upon *one certain point*," etc. (*i*) So, in the Year-books we find the court interrupting the pleader with this remark: "Vous dites chose que veot avoir *deux issues*: — *tenez vous al une*." (*k*)

With respect to the doctrine that the system of pleading contemplates the different objects enumerated in the text, and that these form the secret foundation of most of its principal rules, the author must refer for his chief authority to the intrinsic evidence arising from the consideration of the rules themselves, as subsequently explained in this work. In treating, however, of these different rules, he will be able occasionally to offer some citations from the books, in a great measure confirmatory of the same view.

NOTE (45). See p. 219.

The general effect of these statutes relative to special demurrer is well expressed by Lord Hobart, who says, in reference to the 27 Eliz., ch. 5: "The moderation of this statute is such that it does not utterly reject *form*, for that were a dishonor to the law, and to make it, in effect, no art, but requires only that it be *discovered* and not used as a secret snare

(*f*) Co. Litt. 126 a.

(*g*) Com. Dig., Pleader (R. 8).

(*h*) Com. Dig., Pleader (H. 4).

(*i*) 10 Rep. 90 a.

(*k*) 1 Ed. 2, 14.

to entrap. And that discovery must not be confused and obscure, but special; therefore it is not sufficient to say that the demurrer is *for form*; but he must express what is the *point and speciality of form* that he requires." (l)

NOTE (46). See p. 230.

It is true that in the writ of right the *mise on the mere right* (as to which see pp. 189, 287) is usually considered as the general issue; and in dower that name is often given to the plea of *ne unques seisie que dower*. But though these pleas resemble the general issues in their frequent use and extensive application, they appear not to fall within the strict definition of that term, as they deny neither the whole nor the principal part of the count. In fact, though they tender a kind of issue, they do not contain, in terms, *any* denial or traverse of the count, and are therefore anomalies or exceptions in the system of pleading. The reason is, perhaps, to be found in the great antiquity of these actions, the writ of right and dower, which were in full use at least as early as the time of Glanville — a period considerably anterior to the complete establishment of the doctrine of issue, and of the rules by which it is produced.

It is a dictum of Ashurst, J., that there is no general issue in *quare impedit*; (m) but this seems not to be accurate, as *ne disturba pas* is evidently in the nature of a general issue and is considered as such in many of the books.

NOTE (47). See p. 245.

Where the plaintiff alleges a seisin in fee in his father, the lessor, from whom he claims by descent, the defendant has the option of traversing either that at the time of making the lease the father was seised in fee, or that the reversion in fee belonged to the father after making the lease, or that the reversion descended to the plaintiff; for all these allegations are contained in the declaration, and the denial of any of them is a sufficient answer. (n)

(l) Hob. 282.

(m) 3 T. R. 158.

(n) 2 Wils. 145.

NOTE (48). See p. 251.

Mr. Reeves, in his able History of the English Law, has treated of the origin of special traverses, but not in such a manner as to form any exception to the remark made in the text; for his account relates rather to the manner in which they were invented and introduced than to their use and object. (*o*)

NOTE (49). See p. 253.

Our earliest records present many instances of what may be considered as special traverse in a crude and imperfect form. As these tend to illustrate the origin and meaning of the regular formula afterwards adopted and confirm the views taken in the text of the reasons and manner of its introduction, a few specimens shall here be inserted.

In an assise of mortancestor, the tenant pleads quod terra illa pertinet ad ecclesiam suam, quam habet ex dono Regis Ricardi et ecclesia inde est seisita, etc. The plaintiff then denies the seisin of the church, in this form: Robertus dicit quod pater suus inde fuit seisitus in dominico suo, die qua Rex Ricardus illam ecclesiam dedit prædicto Herberto; ita quod ecclesia illa tunc non fuit seisita, nisi de serviciis illius terræ. (*p*)

In trespass for entering the plaintiff's court and taking away his ward, John, the defendants deny the trespass, but add an explanation: Dicunt quod curiam prædictam non ingressi fuerunt, nec prædictum Johannem ibi ceperunt, etc. Sed verum volunt dicere; quod ipsi fuerunt versus Oxon, et tunc viderunt prædictum puerum, et puer percepit quod prædicta Isabella (one of the defendants) fuit mater sua, et secutus est eam, usque domum suam, et adhuc moram facit cum eâ; sed ipsi eum non duxerunt, etc. (*q*) On the circumstances so disclosed the court decide that the defendare, in point of law, is guilty of taking away the ward.

In trespass for fishing in the plaintiff's *libera piscaria*, the defendants, instead of generally denying the trespass, plead

(*o*) 3 Reeves, 422.

(*p*) Plac. Ab. 44; Staff., rot. 6 (temp. Johan.).

(*q*) Plac. Ab. 124; Berk., rot. 16 (temp. Hen. 3).

that they fished there, as in a fishery where their ancestors and themselves had fished as of their common of fishery,—*et non in propria piscaria et libera ipsius Nicholai.* (r)

NOTE (50). See p. 254.

The principle on which the *absque hoc* was introduced is well illustrated by the following case from the Year-books. In a writ of account brought against a woman as guardian in socage, she pleaded "that the ancestor of the infant held of the defendant by service of chivalry, and that, therefore, she took the infant as guardian in chivalry," and prayed judgment. To this it was objected, "That is no plea, unless you go on to say, *without this, that he held in socage*; for your plea at present is merely *argumentative*." The plea was then proposed in this form: "He held the land of us by service of chivalry — *without this, that we occupy the land as guardians in socage*." To which it was objected, "Your plea is still no plea; you ought to say, *Without this, that he held in socage*; for though the defendant occupy the land as in her own right, she shall still be charged, under these circumstances, as guardian in socage." On this the defendant took the following issue: "*That he held by service of chivalry, without this, that he held in socage.*" (s)

With respect to the *wording* of this formula, *absque hoc quod*, it may be observed that *absque hoc quod*, and *sine hoc quod* (in the record), and *sans ceo que* (in the *viva voce* pleading), were used as common terms of denial at a very early period. Thus, as early as the fifteenth year of John, we find the phrase, *sine hoc quod*, so occurring, in the Placitorum Abbreviatio. (t) They were not, however, originally appropriate (as the parallel English words, "*without this that*," now are) to the case of a *special* traverse; for they were sometimes used where the denial was not of that kind; and, on the other hand, in cases of special traverse, we sometimes find a substitution of other synonymous expressions, such as *et non*. (u)

(r) Plac. Ab. 136; Buck. (temp. Hen. 3).

(s) 10 Hen. 6, 7.

(t) Plac. Ab. 90; Ebor., rot. 28 (temp. Johan.).

(u) Plac. Ab. 136; Buck, cited *supra*, p. lvi.

NOTE (51). See p. 266.

Color a rhetoribus appellatur, probabilis alicujus rei causa, quâ quod falsum aut turpe est, velamus. (x)

And the following passage in Juvenal will readily recur to the reader's recollection:

Quis *color*, et quod sit causæ genus, atque ubi summa
Quæstio quæ veniant diversa parte sagittæ,
Scire volunt omnes; mercedem solvere nemo. (y)

See the observations formerly made on the degree of connection which the method of pleading seems to have with the rules of the ancient logic and rhetoric, *supra*, note (29).

NOTE (52). See p. 267.

The same quality, of admitting an apparent right in the opposite party, belonged to the pleadings in the Roman law. Interdum evenit ut exceptio quæ *prima facie justa* videtur, tamen inique noceat; quod cum accidit, alia allegatione opus est, adjuvandi actoris gratia,—quæ replicatio vocatur; quia per eam replicatur, atque resolvitur jus exceptionis. Rursus interdum evenit, ut replicatio quæ *prima facie justa* est, inique noceat — quod cum accidit, alia allegatione opus est, adjuvandi rei gratia, qua duplicatio vocatur. Et si rursus ea *prima facie justa* videtur, sed propter aliquam causam, actori inique noceat, rursus alia allegatione opus est, qua actor adjuvetur; quæ dicitur triplicatio. (z)

NOTE (53). See p. 273.

The reason of the fiction of *color* is, in some measure, explained in Doct. and Stud. 271; and the explanation, as far as it goes, is conformable with the account given in the text. In this, and in most of the treatises, indeed, color is said to be necessary, in a view to *prevent the plea from amounting to the general issue*. It will, however, appear in a subsequent part of this work (a) that this is, in fact, only an imperfect way of expressing the same doctrine that is laid down in the text.

(x) Turneb. in notis ad Quinotil.

(y) Juv. Sat. vii.

(z) Inst., lib. iv, tit. xiv.

(a) See pp. 409, 410.

It should also be observed that Mr. Reeves assigns as a *motive*, with the ancient pleaders, in giving color, and, indeed, as the secret origin of the practice, the wish to interpose *delay*, by preventing the more summary decision which the general issue would produce. (b)

NOTE (54). See p. 277.

This important rule, "that every pleading is taken to admit such traversable matters alleged on the other side as it does not traverse," appears not to have existed in the *civil law*. "Non utique existimatur confiteri de intentione, adversarius quo cum agitur, quia exceptione utitur," (c) — "Non ad effectum exceptionis pertinet, quod reus excipiens, hoc ipso fateri videretur de intentione actoris." (d) On the other hand, we find it established in the practice of the courts of Normandy. For it is laid down in the *Commentaires de Terrien*: Quand les parties procedent, l'un afferme faicts; — si la partie contre qui les faicts son affermez, n'en donne neance, les faicts affermez, demeurent pour confessez. (e) And it may be observed here, that the analogous principle by which a demurrer is held to admit matters of fact, also prevailed in the Norman law. Thus it is laid down in the same work: Il est defendu de dire je denie vostre faict, et neantmoins je le defens; qui est a dire que quand prouvé seroit, je le soustiens impertinent. Et se faut arrester à l'une des fins (that is, the party must make his election of one of these *issues*), c'est à dire, ou à le nier (au quel cas s'il est prouvé, encores qu'il soit impertinent, le prouvant gaigne sa cause), ou à le defendre et soustenir qu'il est impertinent, et n'inferer la conclusion du demandeur (au quel cas le faict demeure pour connu), ou à soustenir que le faict qu'on afferme au contraire, est plus pertinent. Au quel cas aussi les faicts demeurent pour connus d'une part et d'autre; et s'assiet le jugement de droict sur la pertinence ou impertinence des dits faicts. (f)

(b) See 3 Reeves, 24.

(c) Dig., lib. 44, tit. 1, sec. 9.

(d) Voet, ad Pandectas.

(e) *Commentaires de Terrien*, 1684, liv. ix, ch. xxvii.

(f) *Comment. de Terrien*, ibid.

NOTE (55). See p. 287.

It may be observed that the question for decision by the grand assise is not properly *an issue*; for it is not in the form of a traverse or negative on one side, and affirmative on the other, but of an *alternative* proposition, "whether the tenant has greater right to hold, etc., or the demandant to have," etc. And for the same reason the tenant, in putting himself upon the grand assise, cannot strictly be said to *tender issue*, though the two proceedings are analogous. Accordingly, the term *issue* is not generally applied to this case, but the word *mise* is substituted; and the tenant who pleads in this manner is not said to tender an issue, but to *join the mise*; (g) the word *mise* being, apparently, derived from *mettre*, and having allusion to the words "*puts himself* on the grand assise," etc. The truth is that this form of question was established in practice as early as the time of Glanville, *i. e.*, before the doctrine of issues was well founded, (h) and is a relic of an earlier system than that to which the ordinary issues belong. *Vide supra*, note (46).

NOTE (56). See p. 301.

In the report of the case in Carthew it seems to be supposed that duplicity is, in general, no objection to pleas in abatement; but this is not law. (i) The mistake probably originated in a misapprehension of what is said by Lord Coke; (k) but what he says evidently applies not to duplicity in its proper sense, but to the use of dilatory pleas, *successively in their proper order*, which, as will be hereafter seen, (l) the rules of pleading allow.

NOTE (57). See p. 310.

This rule against double pleading (peculiar at the present day, it is believed, to our own country) is not referable to the sources of the civil or canon law, in both of which the defend-

(g) Finch. Law, 398.

(h) See Glan., lib. 2, chs. 3, 11.

(i) See Bac. Ab., Abatement (P.).

(k) Co. Litt. 304 a.

(l) See p. 420.

ant was allowed to use as many exceptions as he pleased. (*m*) Nor has its origin been hitherto traced. It may not, therefore, be unacceptable to the reader to be informed that this rule, to a certain extent at least, very anciently obtained among the pleaders in Normandy, and was considered as a peculiarity in their plan of allegation. In the *Commentaires de Terrien* we find the following passage: En Normandie l'en ne plaide qu' à une fin, etc. (*i. e.*, a single issue). And afterwards: De la regle dessus dite qu'on ne plaide qu' à une fin, s'ensuit, que combien que de disposition de Droit (*i. e.*, of the civil law) nullus pluribus defensionibus uti prohibeatur, toutesfois cette regle souffre limitation par nostre usage et pratique, en ce qu' on ne pent user de defense de fait *denié*, et de fait *defendu*, (*n*) etc., that is, a party cannot at once plead and demur to the same matter.

After the proofs, given in some of the preceding notes, of the derivation of so much of our judicial system from that of our continental neighbors, the reader will perhaps have no difficulty in adjusting between the two nations the priority of claim to the regulation now in question.

It is farther observable that this rule seems to have been unknown in England (at least not observed in practice) up to the date of Bracton's treatise, for it is not mentioned in the work of Glanville; and during the whole interval between these two authors, the *Placitorum Abbreviatio* abounds with instances of the use of several pleas to the same matter. (*o*)

So far with respect to the *origin* of this rule. With respect to its *principle* or *object*, it was that of avoiding *several issues*. Thus, in the first year of Ed. II., the court interrupt the pleader with this remark: Vous dites chose que veot avoir deux issues — tenez vous al une. (*p*) So in the same year a similar admonition occurs: Il covient que vous tenez al une, par chescun de eux prent diverse issue. (*q*) Again, in the

(*m*) Qui excipit, non propterea confitetur agentis intentionem, cum eidem non solum unam, sed et plures exceptiones etiam contrarias, proponere liceat; quas, si legitimas fuerint, si judex non admiserit potest appellari; judex vero punitur. *Corv. Jus. Canon.*, lib. 3, tit. 32. Pluribus defensionibus uti permittitur. *Dig.*, lib. 44, tit. 1, sec. 5. Nemo prohibetur pluribus exceptionibus uti, quamvis diversæ sunt. *Ibid.*, sec. 8.

(*n*) *Comment. de Terrien*, liv. ix, ch. xxvii.

(*o*) See *Plac. Ab.*, 8 Hertf., rot. 26; 9 Suff., rot. 22; 48 Linc., rot. 7; 50 Buck., rot. 2; 88 Sussex, rot. 22; 82 Linc., rot. 14. *Vide supra*, note (38).

(*p*) 1 Ed. 2, 15.

(*q*) *Ibid.* 3.

reign of Ed. III., one of the judges asks: *Si jeo port un assise devers vous, et vous dites que vous n'aves rien sinon a terme d'ans, et puis dites ouster que la terre est auncien demesne, averes vous cestes deux plees? quasi diceret non: et la cause est pur ceo que deux issues purroient estre pris sur les plees.* (r)

As for the reason why several issues were thus avoided by the early pleaders, it was no doubt the wish to abbreviate and simplify as much as possible the process of the legal contention.

While the explanation of the rule appears to be thus simple, it is not easy to account for the fantastic illustration of its meaning given by Bracton, as cited in a former note. (s) Indeed, it may be observed that the reasons offered for it by late writers, though less quaint, are not quite satisfactory. Thus, it is said in Bacon's Abridgment: (t) "The reasons why duplicity in pleading is a fault are that, the party being effectually barred by one single point, it is unnecessary and vexatious to put him upon litigating any other; and though he might take issue on any one point, yet must he be at a loss which the material point is, so as to traverse the same and thereby put an end to the cause; whereas, the party pleading such double matter must be presumed conscious of his own strength, and therefore ought to put his defense on that single point which will put an end to it. Besides, the jury ought not to be charged with a multiplicity of things, when finding any one of them contrary to their evidence lays them liable to the severity of an attainder." Another writer gives as the reason why a party is confined to one matter of defense, "that the twelve men are commonly rude and ignorant, and so, consequently, not proper to be troubled with too many things at once." (u)

NOTE (58). See p. 310.

On this point of practice, viz., the joinder of different demands in the same action, it may be worth remark that the canon law differed from the imperial institutions.

(r) 40 Ed. 3, 45.

(s) See note (38).

(t) Bac. Ab., Pleas, etc. (K.), 1.

(u) Smith, Repub. Ang., lib. 2, ch. 13, p. 57, cited in *System of Pleading*, p. 197.

Plures actiones, says Voet (quoting the Digest), uno libello cumulari nequeunt. . . . Sed usu hodierno invaluit, plures uno libello actiones cumulari posse, ex Juris Canonici dispositione, quoties ex diversis causis, ad diversa tendentibus, agitur. . . . Cavendum tamen, ne tales cumulentur quæ sibi invicem contrariæ sunt. . . . Non etiam cumulandæ plures actiones ex eadem causa, et ad idem tendentes, veluti actio ex testamento, et rei vindicatio, ad consequendam eandem rem legatam, eo quod altera intentata, alteram perimit. Nec plures actiones contra diversos, ex diversis causis, debitores, etc. (x)

The English courts, it will be observed, have adopted the same rule with the Canonists, but whether by derivation from them or from some other source does not appear.

NOTE (59). See p. 311.

Count is also used in a real action as the name for the *whole declaration*. It is from the French *conte* (narrative), and it is worth notice that in the law of Normandy this word *conte* had a more extensive meaning, and one, therefore, more conformable to its popular and original sense of *narrative* than those which it now bears in the English law, being applied to *any* of the allegations of fact in the cause, at whatever part of the pleading it might occur. In the *Commentaires de Terrien* is cited an ordinance, under date A. D. 1462 and 1497, in the following terms: La Court a ordonne et ordonne que dorenavant apres que les parties auront este ouys verbalement en leurs raisons et conclusions, et escrit en *propos, responce, replique*, et *duplique* (es quels quatre *contes*, les dites parties seront tenues mettre et escrire tous leurs faicts, neances, offres, et raisons, et faire production de toutes leurs escritures quils seront tenues dater et produire) les dites parties pourront outre la *duplique*, mettre et eslire leurs conclusions en deux petis *contes*, etc. (y)

The observation of Craig that the terms of art in the English law are all derived from the French tongue, and have no affinity with the Saxon, has been already cited. (z) And perhaps

(x) Voet. ad Pandectas, lib. ii, tit. xiii, sec. 14.

(y) Comment. de Terrien, liv. 2, ch. xxvii.

(z) Vide *supra*, note (30).

when the reader considers how many proofs have been afforded in the preceding notes of the derivation not only of our legal language but of our *forensic usages* from the same source, he will be inclined to accede — with certain qualifications — to another still broader position of the same author: *Certum est jus omne, quo Angli hodie utuntur, a Normannis, seu pontius a Gallis, ad eos emanasse.* (a) That our system of *pleading*, at least, was borrowed from the Normans, with some early and slight admixture of the principles of the civil and canon law, there seems the strongest reason to believe.

NOTE (60). See p. 327.

Such was the general state of the law on the subject of venue; but many nice questions arose as to the place from which the venue should come in particular cases. This appears to have been a matter in some measure in the discretion of the court; and we accordingly find the judges in some cases departing from the ordinary course and directing the venue to come, not from the place where the matter in issue arose, but where the action was laid, or to come from more counties than one or from different places in the same county. (b) In one case, in consequence of doubts that had risen whence the venue should come upon a plea of *villinage*, it appears that the judges suspended the issuing of the venire till they had consulted parliament whether the venue should be of the county where the villinage was alleged or where the writ was brought. (c)

NOTE (61). See p. 328.

Lord Coke says that by the *common law* four of the hundred were required in actions, real, mixed and personal. (d) He probably by this expression means only the law as anterior to the statute which altered the number in personal actions to *two*, viz., 27 Eliz., ch. 6; for it seems clear that by the *common law* (if by that phrase be understood the state of

(a) Crag. Jus. Feud., lib. 1, D. 7.

(b) Plac. Ab., Suff. 67; 86 Bedf., rot. 7; 94 Northumb., rot. 4; 95 Bedf., rot. 2; 3 Reeves, 107-112.

(c) 3 Reeves, 108.

(d) Co. Litt. 157 a.

law anterior to any of our existing statutes), the jury was to consist wholly of persons from the *immediate venue*, and neither four nor any other number of mere *hundredors* would suffice. Indeed the form of the *venire facias* as it existed even down to the time of Elizabeth and later is alone sufficient to prove this. *Præcipimus, etc., quod venire facias, etc., 12 liberos et legales homines de vicineto de B., etc.* (e) The law with its usual adherence to old usages retained this form of direction to the sheriff, though in fact his duty had at the time of that statute long been confined to summoning some of the jurors from the *hundred* only in which B. was situate, and the remainder from the *county at large*; but the form serves to show the nature of the more ancient practice upon which it had been originally framed.

The same point is still more distinctly proved by the still existing rule, that a *hundred is not a sufficient venue to lay in the pleading* (f)—a rule that seems quite inconsistent with the supposition that a summons of hundredors only was originally sufficient.

NOTE (62). See p. 330.

Lord Coke seems to hold that this distinction between local and transitory matters, and the maxim by which it is expressed, *debitum, et contractus, etc., sunt nullius loci*, prevailed at the *common law*. (g) Yet it is difficult to conceive this to have been the case, when the character of the original institution of trial by jury is considered, because the practice of observing the true venue, in transitory as well as local matters, seems necessarily consequent upon the nature of that institution, according to its most ancient form, that is, when the jurors consisted of persons cognizant of the fact on their own knowledge. (h) Perhaps the expressions of Lord Coke, when fairly construed, do not mean more than to trace the prevalence of this distinction to a *very early period*, and are not to be taken as declaring the original state of the law on this point.

(e) 27 Eliz., ch. 6.

(f) Co. Litt. by Harg. 125 a, n. 1.

(g) 7 Rep. 3 a; Bulwer's Case. And see 1 Saund. 74, n. 2.

(h) See note (43).

It is to be observed that Lord Chief Baron Gilbert lays down on this subject propositions strongly confirmatory of the view taken in this work, and irreconcilable with the supposed doctrine of Lord Coke, if that doctrine be understood to imply an *original* distinction between local and transitory matters. "The venire was to bring up the *pares* of the place where the fact was laid in order to try the issue; and originally *every* fact was laid in the place where it was really done; and therefore the written *contracts* bore date at a certain place, etc." (i)

NOTE (63). See p. 331.

It has been said that the practice of changing the venue rests on the equity of the statute 6 Ric. II., stat. 1, ch. 2. (k) On examination, however, of that statute this doctrine will be found to be attended with great difficulties; and if the view taken in the last note be a correct one, the practice of changing the venue may be more simply and satisfactorily referred to the ancient principle of the common law requiring the jurors in all cases to be summoned from the true neighborhood.

NOTE (64). See p. 334.

So, the objection of an impossible or inconsistent date, even where the time *is* necessarily alleged, will in many cases be aided, *after verdict*, by the effect of the verdict itself. (l) And as well after verdict as after judgment by confession *nil dicit*, or *non sum informatus*, it will, in many cases, be cured by the statutes of jeofails and amendments, (m) 16 and 17 Car. II., ch. 8, sec. 1, and 4 Ann, ch. 16, sec. 2; by which it is provided that judgment shall not be stayed or reversed for mistaking the day, month or year, when the right day, month or year is once truly and rightly alleged in the record.

NOTE (65). See p. 338.

Though in the preceding examples *the judgment was arrested after verdict* on the ground of the omission of quality, quantity or value, yet it must be observed that the objection

(i) Glib. Hist. C. P. 84.

(k) Vide 1 Saund. 74, n. 2; Black. Com. 1033.

(l) 2 Saund. 171 c. With respect to aid by verdict, vide *supra*, p. 225.

(m) As to the operation of these statutes, vide *supra*, p. 226.

is now rarely perhaps available at *that stage of the cause*. For in many cases the fault would no doubt be considered as aided by the effect of the verdict itself. Thus, if the jury find a certain amount of debt or damage to be due, it appears to supersede any farther consideration of the quality, quantity or value of those goods and chattels in respect of which the amount of the claim is thus liquidated. And even when the verdict has itself no healing operation of this kind, the statutes of jeofails, which, after verdict, cure all defects of mere form, would probably be held, in many instances, to remove the objection. The courts formerly, indeed, entertained another view on this subject; holding the omission of quality, quantity or value to be matter not of form but of substance, (n) and therefore not capable of being cured by the statutes of jeofails then in force; but the more liberal doctrines of the modern pleading, or the wider effect of the subsequent statutes of jeofails, seem to have relaxed this severity. Accordingly, it has been the tendency of recent authorities to consider objections of this kind as immaterial *after verdict*. Thus, in *assumpsit*, the declaration stated that in consideration that the plaintiff had sold to the defendant a *certain horse* of the plaintiff's, at and for a *certain quantity of oil*, to be delivered *within a certain time*, which had elapsed before the commencement of the suit, the defendant promised to deliver the said oil accordingly; though neither value, quantity nor time was specified, yet the court held that the objections thence arising could not prevail *after verdict*. (o) However, it seems that there are some instances in which the fault is still considered as matter of substance, and ground for arresting or reversing the judgment after verdict; as in the case of replevin cited in the text, (p) where the declaration did not set forth the nature, number or value of the goods.

When an omission of this kind is considered as mere form so as to be cured by the statutes of jeofails, it will be so cured, not only after *verdict*, but also after judgment by *confession*, *nil dicit*, or *non sum informatus*; and if made the subject of demurrer, the demurrer must be *special*. (q)

(n) 5 Rep. 34 b.

(o) 2 Bos. & Pul. 265.

(p) 7 Taunt. 642.

(q) As to special demurrer, *vide supra*, pp. 219, 220.

NOTE (66). See p. 340.

Though the rule prescribing the specification of quality, quantity and value has been here classed as tending to the *certainty of the issue*, the author is aware that, according to some authorities, these particulars are required in another view, viz., the more certain information of the opposite party of the nature of the demand against him in order to enable him to plead to it more precisely. But though this object may have been sometimes contemplated as an additional ground for enforcing the specification of quality, quantity and value, the author conceives that particularity on these points was originally and mainly required in reference to the same general design which forms the basis of all the rules with respect to certainty, viz., the production of a *certain issue*; and that this subject, therefore, occupies its right place in the treatise.

That to produce *certainty in the issue* is the general design both of this and all the other rules that enforce certainty *in the pleadings* may not only be inferred from the reason of the thing, but distinctly proved by several authorities. Thus Bracton lays it down: *Certa debet esse intentio et narratio, et certum fundamentum, et certa res quæ deducitur in judicium.* (r) So in treating of an assise of novel disseisin of common of pasture, and of the form of *intentio* or count, he says: *Oportet docere de qualitate pasturæ utrum sit larga vel stricta, ut certa res deducatur in judicium.* Item de quo tenemento pertineat, et ad quale tenementum. Et eodem modo de *tempore, genere, numero, et modo*, (s) etc. And the same doctrine is laid down still more decisively in the following passage: *Oportet quod petens rem designet quam petit, videlicet qualitatem, ut sciatur utrum petatur terra, vel redditus, cum pertinentiis; — item quantitatem, utrum videlicet sit plus vel minus, quod petitur. Certam enim rem oportet deducere in judicium, ne contingat judicium esse delusorium vel obscurum quia de re incertâ in judicium; deductâ, certa fieri non poterit sententia.* . . . Specificare autem poterit, sic, ut si dicat — *Peto versus talem tot maneria, quandoque cum pertinentiis, quandoque sine; item tot feoda militum cum pertinentiis; item tot carucatas terræ, tot virgatas, tot acras, tot selliones, etc.* (t)

(r) Cited Co. Litt. 308 a.

(s) Bract. 224 b.

(t) Ibid. 431 a.

Thus, too, it is laid down by Lord Coke, that in pleading performance of the condition of a bond the party "ought to plead, in certainty, the time and place and manner of the performance, *so as a certain issue may be taken*," (u) etc.

NOTE (67). See p. 385.

The principle of the rule against a *negative pregnant* is not clearly or satisfactorily explained in any of the treatises; and indeed, very little is said in them upon this subject, though the fault itself is, in the older cases, a frequent ground of objection. That the author has here suggested the true principle is confirmed, he thinks, by the form in which we find this kind of objection taken in the following case from the Year-books. In an action for negligently keeping a fire, by which the plaintiff's houses were burnt, the defendant pleaded that the plaintiff's houses *were not burnt by the defendant's negligence in keeping his fire*; and it was objected that "the traverse was not good, for it *has two intendments* — one, that the houses were not burnt; the other, that they were burnt, but not by negligent keeping of the fire; and *so it is a negative pregnant*." (x) Thus, too, we find it laid down, "Therefore the law refuseth double pleading and negative pregnant, though they be true, because they do *inveigle*, and *not settle the judgment upon one point*." (y) So it is said in another book: "A negative pregnant is when two matters are put in issue in one plea; and this makes the plea to be naught, because the plaintiff cannot tell in which of these matters to join issue with the defendant, for the uncertainty upon which of the matters the plaintiff doth insist; and so it is not safe for the plaintiff to proceed upon it." (z)

NOTE (68). See p. 389.

Of this distinction — that *non est factum* is to be pleaded by a party, but not by a stranger,— the reason is thus given by the court, in the reign of Hen. IV.: *Le cause est, pur ceo que home poit bien scavoir quel fait il m. fait — mais estranger a*

(u) Cro. Jac. 360.

(x) 28 Hen. 6, 7.

(y) Hob. 295.

(z) Styles' Pract. Reg., tit. Negative Pregnant.

un fait, ne poit pas scavoir quel fait cesty que estate il ad, fesoit, (a) etc.

It is to be observed that, with respect to *real or personal representatives*, they are in the same situation with *parties*, and must plead *non est factum*. (b) With respect to *privies in estate*, they are *strangers* within the rule in question. (c)

NOTE (69). See p. 393.

In treating of the observance of established forms of statement by the ancient pleaders, Mr. Reeves remarks. "It was impossible that a set form of expression could be designed for every matter that might become the subject of a declaration or plea. But many modes and circumstances of property recurred so often in judicial inquiries as to obtain apt and stated forms of description and allegation, which were established by long usage; the experience of them having shown them preferable to all others. These, therefore, were adhered to by pleaders, and the nicety with which they were conceived is a strong mark of the refinement and curiosity with which this part of our law was cultivated." (d)

NOTE (70). See p. 394.

The plea of *coverture*, however, concludes *to the writ, i. e.*, with a prayer, *quod breve cassetur*, and not with *responderi non debet*. (e) So, in an action against a man as executor, if he pleads that he is *administrator*, this plea must conclude with *breve cassetur* and not with *responderi non debet*. (f) Indeed it may be remarked generally, that all such matters as not *only* relate to the *person* of the plaintiff or defendant, but also tend to show that the *form of the writ* is erroneous, are apt to be considered as pleas in abatement *to the writ* rather than *the person*, and therefore conclude not with *responderi non debet* but *breve cassetur*. It is only such matters as *alienage, excommunication, etc.*, which relate to the person *exclusively*,

(a) 2 Hen. 4, 20.

(b) 1 Lutw. 662.

(c) 2 Hen. 4, 20. See *vide* 2 Taunt. 281.

(d) 2 Reeves, 463, 464.

(e) 1 Chitty, 450.

(f) 1 Ld. Raym. 62.

and show that no form of writ would be correctly applied, that will be found to have the former conclusion. In Comyns' Digest (g) very numerous instances of pleas in abatement to the person are enumerated, but on examining them they appear, for the most part, to relate both to the person and the form of the writ; and in all such cases we shall find, in conformity with the remark above made, that though classed by Comyns among pleas in abatement to the person, they conclude with *breve cassetur* and not *responderi non debet*.

NOTE (71). See p. 398.

Some of these formal commencements and conclusions are of great antiquity. Thus, in Britton (the first law treatise in French, supposed to be written in the reign of Ed. I.), (h) we find this form of commencement: *le pleintife ne purra rien conquere*, (i) which is nearly the same with *actio non*. We also find the following: *l' escript ne luy doit grever*. (k) This is the *onerari non*. So the *prayer of judgment*, at the conclusion of pleadings, is mentioned in Bracton. (l)

A somewhat curious circumstance, and one that seems to deserve remark in this place, is that a form exactly parallel to that last cited from Britton is to be found in the still extant pleadings of the Lombards. Thus: *Ipsa chartula non mihi nocet*, quia eram Longobarda — non potui facere sine parentibus. (m) And again: Si appellator dixerit, Ecce charta quam pater tuus mihi fecit, — et appellatus dixerit, *Illa charta nihil mihi impedit*, quia pater meus fecit eam, per virtutem (i. e., vim) — approbet, (n) etc.

NOTE (72). See p. 399.

Though it be said that it is sufficient to pray judgment generally (except in the case of pleas in abatement), and that upon such general prayer the court will, *ex officio*, award the proper legal consequence, yet it may be doubted whether this

(g) Com. Dig., Abatement (E.), (F.).

(h) 2 Reeves, 280.

(i) Brit., ch. 96.

(k) Ibid., ch. 28.

(l) Bract. 57 b.

(m) Leges Liutpr., lib. VI, 74.

(n) Leges Ottonis II. Augusti, ch. 5.

proposition does not require considerable qualification. The cases do not satisfactorily prove that a simple prayer of judgment, without more, would in every case be held good, supposing the want of form to be specifically objected upon demurrer. (o)

NOTE (73). See p. 400.

It is laid down in several books that if a plea which contains matter in bar conclude in abatement, it is a plea in bar, notwithstanding the conclusion. (p) If this proposition be meant to include the case where there is not only a conclusion, but a commencement in abatement, it is opposed to the decision in 6 Taunt. 587, as cited in the text. And, even if it be intended to apply only to the case where there is a conclusion in abatement, but no commencement either way, the soundness of the doctrine seems doubtful. For it is said to be founded on this principle: that where there is no cause of action the plaintiff can have no writ; (q) and the opinions of Prisot, J., and Littleton, J., are cited to this point, from the Year-books. It is observable, however, that this principle would only tend to show that such a plea would be a good plea in abatement, and does not explain why it should be considered as a plea in bar. And though Prisot, J., in 37 Hen. VI., 24 a, holds that it would be a plea in bar, the opinion of Littleton, J., 36 Hen. VI., 18, when examined, does not go to that extent. He merely says it would be a *good plea*. There seems reason, therefore, to doubt whether such plea should not be taken (in conformity with the general principle, *conclusio facit placitum*) as a plea in *abatement*. (r) As to the case where the commencement is one way and the conclusion another, as where the plea commences in bar and concludes in abatement, or commences in abatement and concludes in bar, see 2 Saund. 209 d, n. 1.

NOTE (74). See p. 402.

Lord Coke defines it thus: "A departure in pleading is said to be when the second plea containeth matter not pur-

(o) See the cases, 1 Lev. 222; 2 Lev. 19; 1 Str. 523.

(p) 2 Saund. 209 c, n. 1; 1 Chitty, 446; 1 Arch. 304.

(q) 1 Chitty, 446; 2 Saund. 209 c, n. 1.

(r) See 10 Mod. 112; 6 Taunt. 533.

suant to his former, and which fortifieth not the same. And therefore it is called *decessus*, because he departeth from his former plea." (s)

Mr. Sergeant Williams gives the following definition: "A departure in pleading is said to be when a man quits or departs from one defense which he has first made and has recourse to another; it is when his second plea does not contain matter pursuant to his first plea, and which does not support and fortify it." (t)

NOTE (75). See p. 415.

This form of commencing the declaration — *ceo vous monstre* — occurs in the year-books *passim* and in the *Novæ Narraiones*, which is of the time of Ed. III., and contains the most ancient precedents in the Law French. (u) The same commencement, latinized, occurs in Bracton: *Hoc ostendit vobis*. (x) The form of an earlier period, as given by Glanville, in Latin, is *peto*, (y) etc.

NOTE (76). See p. 418.

It is said in Fleta that the rule requiring the production of suit in the declaration is the subject of one of the provisions of Magna Charta. *Ad hoc facit hoc Statutum in Magna Charta. Nullus liber homo ponatur ad legem, nec ad juramentum, per simplicem loquellan, sine testibus fidelibus ad hoc ductis*. (z)

NOTE (77). See p. 419.

The practice of finding pledges to prosecute appears to have been an effective one, at least as late as the time of Bracton. "Si quis," says that author, "plegios inveniet de prosequendo, et non fuerit prosecutus, omnes erunt in misericordia, tam plegi, quam principales."

(s) Co. Litt. 304 a.

(t) 2 Saund. 84, n. 11.

(u) See, also, Britton, 59.

(x) Bract. 296 b, 372 b.

(y) Glan., lib. 2, ch. 1; 3 lib. 4, ch. 6.

(z) Fleta, 137.

NOTE (78). See p. 420.

The order of pleading has generally been given in a less detailed form than that contained in the text.

According to Mr. Tidd it is as follows:

1. To the jurisdiction of the court.
2. To the person. { 1. Of the plaintiff.
2. Of the defendant.
3. To the count.
4. To the writ. { 1. To the form of the writ.
2. To the action of the writ.
5. To the action itself; in bar thereof. (a)

And it is given in nearly the same manner in the Preface to the *Doctrina Placitandi*, and in Bacon's Abridgment. (b)

Lord Holt states it still more generally: "The law has prescribed and settled the order of pleading which the party is to pursue, viz.: to the jurisdiction of the court; to the disability of the person; to the count; to the writ; and lastly, to the action." (c)

This is almost in the same terms with Lord Coke: "First, in good order of pleading a man must plead to the jurisdiction of the court. 2. To the person; and therein, first to the person of the plaintiff, and then to the person of the defendant. 3. To the count. 4. To the writ. 5. To the action, etc. Which order and form of pleading you shall read in the ancient authors, agreeable to the law at this day; and if the defendant misorder any of these, he loses the benefit of the former." (d)

NOTE (79). See p. 422.

Defendere was the word most often used in ancient times to express *denial*. Thus we find it employed to deny the genuineness of a deed: *Petrus venit et defendit cartam, quod nunquam facta fuit per Petrum de Goldington, etc.* (e)

(a) 1 Tidd. 555.

(b) Bac. Ab., Pleas, etc. (A.).

(c) Lord Ray. 970.

(d) Co. Litt. 303 a.

(e) Plac. Ab., 97; Leic., rot. 11 (temp. Johan.).

NOTE (80). See p. 422.

“Defense, in its true legal sense, signifies, not a justification, protection or guard, which is now its popular signification, but merely an opposing, or denial (from the French word *defender*), of the truth or validity of the complaint. It is the *contestatio litis* of the civilians.” (*f*) As to the latter proposition, *vide supra*, note (42), where it is shown that the *contestatio litis* has a different meaning in the civil law.¹

NOTE (81). See p. 423.

With whatever object introduced, the use of the words *defendit jus suum*, and *defendit vim et injuriam*, in the plea, is coeval with the most ancient records; for we find them in the earliest specimens from the Placitorum Abbreviatio, in the beginning of the reign of Ric. I.: Rogerus de Hinton defendit jus suum et dicit. (*g*) Et Yvo venit et defendit jus suum et dicit. (*h*) Et Robertus venit et defendit vim et injuriam et dicit. (*i*)

NOTE (82). See p. 424.

The rule by which a plea in abatement is required to give the plaintiff a better writ is very ancient, being laid down by Bracton in the reign of Hen. III. Thus he says, in speaking of the plea of *non tenure*: Notandum, quod cum tenens semel talem exceptionem proposuerit, ulterius consimilem proponere non possit, ne diutius protrahatur negotium; et tenens ad hoc poterit coarctari, quod ostendat quis in possessione extiterit — ne iterum cadat breve per mendatium; et, etiam ad omnes exceptiones quæ faciunt ad breve prosternendum. (*k*) So Britton says, in speaking of the same plea: Si le tenant die que il ne tient mye l'entier, adonques covient que il die qui tient le remenaunt. Car nous volons eins ceo que brefs se abatent par vice et par erreur, que les tenaunts informent les pleintifos coment ils purchaserount bons brefes. (*l*)

(*f*) 3 Bl. Com. 296.

(*g*) Plac. Ab. 1; Dorset., rot. 5 (temp. 6 Ric. 1).

(*h*) Plac. Ab. 7; Cantabr., rot. 36 (temp. 10 Ric. 1).

(*i*) Plac. Ab. 60; Ebor., rot. 23 (temp. 15 Johan.).

(*k*) Bract. 481 b.

(*l*) Brit., ch. 84.

¹ See *Houghton v. Townshend*, 8 How. Pr. 411.

NOTE (83). See p. 425.

This principle relative to dilatory pleas, viz., that they should be pleaded at a preliminary stage of the suit, appears to have been borrowed from the canon or civil law: *Dilatoriae exceptiones, si declinatoriae iudicii, ab initio et in litis ingressu, proponi debent; alioquin, omissæ, non repetuntur; ut neque quæ contra iudicem, vel ejus incompetentiam proponuntur,—quæ defensionem præcedere debent, etc. (m)* Si quis advocatus, *inter exordia litis prætermisam dilatoriam præscriptionem (i. e., exceptionem), postea voluerit exercere, et ab hujusmodi opitulatione submotus, nihilominus perseveret, atque præposteræ defensioni institerit, unius libræ auri condemnatione, multetur. (n)*

NOTE (84). See p. 425.

The rule requiring that each pleading should be supported by proof appears to have extended equally to the declaration and to the subsequent pleadings; for the *secta* was considered as a species of proof offered in support of the declaration.

To establish in a satisfactory manner the existence of this rule, several authorities shall here be cited. First, in speaking of the *intentio*, or count, in a writ of right; Bracton says: *Item non sufficit quod petens intentionem suam sic proponat et fundet, nisi sic fundatam probaverit, et dicatur in fine intentiones fundatæ, "et quad tale sit jus suum offert," etc. (o)* Again, with respect to *exceptiones*, or pleas, generally, he lays it down: *Sicut ille qui dicit, tenetur probare actionem,—ita ille qui excipit, exceptionem,—sive affirmando, sive negando, dum tamen negativa habeat in se, affirmativam implicitam. (p)* So he says that where a tenant has occasion to plead the grant of the demandant, *ostendere debet tenens chartam ad probandam exceptionem suam, quod si non fecerit, exceptio sua nulla, et amittat sicut indefensus.* Si autem chartam forte exhibere non possit, qui illa ad manum non habuerit, de necessitate erit ad patriam recurrendum. (q) And of *exceptiones* in gen-

(m) *Corv. Jus. Canon.*, lib. 2, tit. 32.

(n) *Cod.*, lib. 8, tit. 36, sec. 2.

(o) *Bract.* 373 b.

(p) *Ibid.* 307 b.

(q) *Ibid.* 34 a.

eral he says: Sicut necesse est actionem proponere, et fundare, et *probare*, ut prima facie justa videatur,—ita oportebit exceptionem. (r) The reader may also be referred to the Placitorum Abbreviatio, *passim*, where the pleadings are constantly accompanied with an offer of some method of proof. The latter work contains in particular the following entries, which afford strong confirmation of the same principle:

Isabella de B. petit versus R. de B., dimidium, etc., ut jus suum et hereditatem. Et ipse venit et defendit jus suum. *Et ipsa nullam sectam adduxit. Eat sine die. (s)*

Gilbertus de Beivill petit versus Willielmum de Beivill duas virgatas terræ cum pertinentiis in Gunetorp, quæ eum contingunt de socagio quod fuit patris eorum, in eadem villâ. Willielmus defendit quod socagium illud nunquam partitum fuit, nec debet partiri. Et hoc offert defendere, etc. Quia *Gilbertus nullam probationem produxit*, consideratum est quod Willielmus eat inde sine die, et quietus. (t)

In an action of assise, of novel disseisin, we have the following entry:

Assisa venit recognitura si Oliverus filius Ranulfi Haki, et Simon Medicus, disseisiverunt Willielmum filium Simonis, et Sibillam uxorem suam, injuste et sine iudicio, de libero tenemento suo in Cliftun infra assisam. Simon Medicus dicit, quod ipse disrationavit illud tenementum versus Oliverum, in curia Domini Regis, per concordiam inde inter eos factum. *Et inde protulit cirographum factum inter eos inde.* Et Oliverus venit, et idem testatur; et dicit quod disrationavit terram illam per assisam mortis antecessoris, versus matrem suam et fratrem suum, et ipsam Sibillam sororem suam, post obitum patris sui; in qua terra ipsi injuste se tenuerunt. *Et inde producit milites de comitatu, qui eidem assisæ capiendæ interfuerunt, et hi idem testantur.* Willielmus et Sibilla dicunt quod postquam inde Oliverus disrationavit illam terram, dedit eis terram illam, et homagium inde cepit. *Et inde ponunt se super visinetum. (u)*

The following is an entry in an assise of mortancestor:

Assisa venit recognitura si Willielmus pater Jurdani saisitus

(r) Ibid. 400 a. See, also, 215 b.

(s) Plac. Ab. 62; Staff., rot. 7 (temp. 10 Johan.).

(t) Plac. Ab., temp. Johan.

(u) Plac. Ab. 81; Bed., rot. 4.

fuit in dominico suo ut de feodo, de duabus carucatis terræ cum pertinentiis in Tadestorn. die qua obiit; et si obiit post primam coronationem Henrici Regis, patris Domini Regis; et si præfatus Jurdanus propinquior hæres ejus sit; quam terram Thomas frater Willielmi de Mare tenet. Et prædictus Thomas venit et dixit quod assisa inde fieri non debet, quia ipse Jurdanus et frater ejus primogenitus implacitaverunt ipsum Thomam de ipsa terra, per breve de recto, ita quod per placitum illud, quædam particula de terra illa, eis remansit; et postea ceperunt pro eadem terra duas marcas argenti et unum chazurum. *Et hoc offert probare adversus eum, prout Curia consideraverit. Sed nullam produxit probationem.* Et Jurdanus venit et defendit quod ipse nullum fratrem primogenitum legitimè natum habuit. Et quod ipse nunquam in curia ulla, quietam clamavit terram illam, nec inde duas marcas vel pecuniam aliquam inde cepit. *Et hoc offert defendere perquendam liberum hominum suum. Et Thomas nihil quam defensionem illam dixit vel obtulit, nec sectam quod ipse Jurdanus primogenitum fratrem habuit, produxit, nec curiam aliquam in qua placitum esset inter eos, nec quando finis factus esset inter eos.* Consideratum est quod ipse Jurdanus habet inde saisinam suam. (x)

These authorities, to which many others of the same class might easily be added, are sufficient to prove that a tender of evidence was, before and at the time when Bracton wrote, considered as a necessary ingredient in all pleadings of the affirmative kind. Soon after that period, however, the process of pleading began to be conducted with a more distinct and single view to the development of the particular question in controversy or production of issue; and when so conducted, the offer of evidence in support of any allegation would naturally be considered as premature till it were ascertained that such matter came into dispute. The rule in question appears, therefore, under the influence of this cause to have suffered a silent abrogation; yet vestiges of it to this day remain in the *production of suit* and in the formal *verification*.

NOTE (85). See p. 426.

Thus Bracton lays it down (in a passage cited in the last note): Si autem chartam forte exhibere non possit, quia illam

(x) Plac. Ab., 30 Hertf. temp. Ric. 1.

ad manum non habuerit, de necessitate erit *ad patriam* recurrendum. (y) Again, in treating of the exception that the demandant was a villein, he says: Oportet quod tenens probet exceptionem per parentes, quos statim habeat ad manum, si possit, etc. But if the case was that no *parentes* could be produced on either side, then recourse was to be had to a *jurata*. *Probat enim tenens exceptionem per juratam*; in quam de necessitate consentire oportet, *propter defectum alterius probationis*; quia si non habeat parentes, de necessitate recurritur ad *juratam* — alioquin, *nulla erit exceptio, quasi deficiente probatione*. Eodem modo dici poterit de replicatione querentis. (z) Again, this author observes: *Probari poterit exceptio multis modis, tum per vocem mortuam, sicut per instrumenta, tum per vivam, sicut per patriam et inquisitiones, etc.* (a) And in another place he speaks of probatio per instrumenta — quæ quidem si non fuerint recognita, fides eorum multipliciter *probari* poterit, vel per collationem signorum, vel per testes, vel per *patriam*, et aliis multis modis, &c. (b)

NOTE (86). See p. 426.

Prest, etc., was the constant form in the *viva voce* pleading, of offering to prove *by jury*, as appears in almost every page of the year-books.

Sometimes the *prest*, or *prest, etc.*, is more fully given, thus — *prest d'averrer*; that is, *ready to prove, or to verify*.

NOTE (87). See p. 429.

The following examples, which, independently of the view in which they are adduced, are curious and deserve attention, will illustrate the original meaning and object of the *profert*; and, as the author conceives, fully support him in the new view he has ventured to take on this subject.

In the first of them it will be observed the plaintiff offers proofs both by deeds and by the Roll of Winton, and the defendant also refers to deeds in support of his plea.

(y) Bract. 34 a.

(z) Ibid. 216 a.

(a) Ibid. 400 b.

(b) Ibid. 305 a. Et vide 289 b, 290 a.

Abbas Sampson queritur quod Osbertus de Weckesham, miles episcopi Eliensis, injustè levavit furcas, et suspendiam fecit, in manerio de Hecham infra libertatem Scti Edmundi; et contra libertatem quam habuit beatus Edmundus a tempore Regis Edwardi, et ex ejusdem Regis dono. Et inde *protulit cartas* diversorum Regum, etc. Et *præterea ponit se inde super Rotulum Winton*, etc. Osbertus venit et trahit inde Episcopum Eliensem ad warrentum. Episcopus venit et warrantizat illud suspendium quod et de jure factum fuit, ut dicit, quia libertatem habuit et habet Sancta Ethildreda a tempore Edgari Regis, qui universas libertates dedit ecclesiæ Sanctæ Ethildredæ, cum suspendii libertate, etc. *Protulit etiam cartam* et confirmationem Regis Edwardi, qui confirmavit libertates omnes ita datas Sanctæ Ethildredæ tam in manerio de Hecham, cujus membrum est Weckesham, et impertinentiis omnibus, quam in aliis maneriis, sine omne exceptione, etc., sicut Rex Edgarus eis concesserat. *Protulit etiam cartas* Regum Willielmi Conquestoris, Henrici avi, et aliorum, etc. (c)

In the next example the plaintiff offers a *deed* with the subscribing witnesses, or the *grand assise*, as *alternative modes of proof*:

Johannes de Crioill, et Johanna uxor ejus, petunt versus Petrum de Goldington, terram de Winchinton tenendam et habendam, sicut illam quæ data fuit eidem Johanni, in liberum maritagium, ex dono Petri de Goldington et Evæ uxoris suæ, et unde Willielmus pater ejus et Johanna uxor ejus seisiti fuerunt tempore Henrici Regis patris, et ipse Johannes Crioill postea, capiendo inde explecia ad valenciam XX solidorum, etc. Et inde *protulerunt cartam* Petri de Goldington, et Evæ uxoris suæ, donationem testantem. Petrus venit et defendit jus, etc., et dicit quod terra illa de Winchinton fuit maritagium Evæ matris suæ, et eidem descendit tanquam recto heredi, et offert defendere jus et donationem cartæ, etc. Et præterea *ponit se in magnam assisam* Domini Regis, etc. Ipsa e contra dicit quod *ponit se in magnam assisam, si sufficere ei non potest carta* Petri patris sui et Evæ matris suæ (quæ testatur quod si non possint et terram illam warrantizare excambium

ei facient ad valenciam in Stokes vel in Cotes), et *vivæ voces testium carte*, etc. (d)

The following passage of Bracton, already cited for other purposes in previous notes, seems decisively to confirm the same view of the original meaning of the profert:

Ostendere debet tenens chartam ad probandam exceptionem suam; quod si non fecerit, exceptio sua nulla, et amittat sicut indefensus. Si autem chartam forte exhibere non possit, quia illam ad manum non habuerit, de necessitate erit ad patriam recurrendum. Et eodem modo si casum allegaverit, et casum probaverit. (e)

On this subject it is not undeserving of remark that though in the king's bench the profert is made in the *body* of the declaration, yet in the common pleas its proper place is at the *conclusion*—a position that entirely corresponds with the idea that it is derived from the old rule of law in question, under which it was the practice to make the offer of proof at the *conclusion* of the pleading,—as appears by the examples cited in this note, and by a great variety of entries in the *Placitorum Abbreviatio*.

NOTE TO § 62, p. 107.—The common-law courts in England were very strict as to the manner of presenting certain defenses, and required that some should be presented in person and others might be by attorney or barrister and others must be by counsel. *Niapel v. W. U. Ry. Co.*, 64 Ill. 811.

In modern practice every man may plead his own cause, and it would seem to follow that any pleading which professed to come from the parties must be noticed whether signed or not.

A plea to the jurisdiction should profess to be in person (1 Chitty, Pl. *423), because it is said the appointment of an attorney *of the court* admits jurisdiction. *Id.* *457; 2 Saund. 209 b. In America the ancient strictness was formerly observed, as to the kinds of pleas which must be presented in person signed by attorney or counsel. *President, etc. v. Miller*, 2 Cain. 60; *Satterlee v. Satterlee*, 8 John. 327; *Doubois v. Phillips*, 5 id. 236. A signature by a firm in the firm name is sufficient. *Zimmerman v. Mead*, 18 Ill. 304. See *Pain & Duer's Pr.* 439.

Where a statute requires the complaint to be signed by the plaintiff or his attorney, the signing of the verification is sufficient. *Barrett v. Josylin*, 29 N. Y. Sup. 1070; *Harrison v. Wright*, 1 N. Y. Rep. 736. See notes 6-8.

(d) *Vide Plac. Ab.* 63; *Lalc.*, rot. 13.

(e) *Bract.* 34 a.

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